



# Massachusetts Rules of Criminal Procedure

Including amendments effective:

**November 1, 2025**

Published by the  
Massachusetts Trial Court Law Libraries



# Massachusetts Rules of Criminal Procedure

Including amendments effective November 1, 2025

Published by the Massachusetts Trial Court Law Libraries

## Rules of Court Disclaimer

The [Massachusetts Trial Court Law Libraries](#) makes every effort to provide a current and accurate copy of the rules of court. However, this is not an official source for the rules and the libraries cannot be held responsible for any errors or omissions contained on these pages. If you are concerned about the timeliness or accuracy of a rule, please consult one of the print sources for Massachusetts Rules of Court or contact your nearest Trial Court Law Library for assistance.

Print sources for rules:

- Annotated Laws of Massachusetts: Court Rules, LexisNexis, annual.
- Massachusetts General Laws Annotated, v.43A-43C, West Group, updated annually with pocket parts.
- Massachusetts Rules of Court, West Group, annual.
- The Rules, Lawyers Weekly Publications, loose-leaf.

# Rule 1: Title; Scope

(Applicable to cases initiated after September 7, 2004)

## (a) Title

These rules may be known and cited as the Massachusetts Rules of Criminal Procedure.  
(Mass.R.Crim.P.)

## (b) Scope

These rules govern the procedure in all criminal proceedings in the District Court, in all criminal proceedings in the Superior Court, in all delinquency and youthful offender proceedings in the Juvenile Court, District Court and Superior Court consistent with the General Laws, and in proceedings for post-conviction relief.

## Rule History

*Amended March 8, 2004, effective September 7, 2004.*

## Reporter's Notes

### *(2004)*

Rule 1 is drawn from and combines Fed. R. Crim. P. 60 and 1. The substance of the rule defines the scope and applicability of the remainder of the rules.

These rules are applicable to the criminal process in those courts having general criminal jurisdiction. This code represents an attempt to consolidate into a single document rules of procedure to apply with the fewest possible exceptions to the appropriate departments of the Trial Court of the Commonwealth. Those exceptions are delineated in each rule where different procedures must prevail. There is, of course, a limitation inherent in any comprehensive set of procedural rules. That is, a variety of special procedures or factual situations exist where the mechanical application of the rules would work an unnecessary hardship or an injustice. In those limited circumstances, sound judicial discretion will require a construction of the rules so as to secure simplicity in procedure, fairness in the administration of the criminal justice system, and the elimination of unnecessary expense and delay as required by Rule 2(a).

In order to be of broad application to criminal practice, it was necessary for the rules to prescribe general procedures suitable for all courts within their scope. It is necessary that

the rules be general and flexible, prescribing only basic essentials, rather than rigid and detailed. It is also necessary that the Rules be reviewed periodically to assess their operation and to take account of changes in both law and society over time. Such a comprehensive review was undertaken beginning in 1995, resulting in subsequent amendments to several of the rules, including a set of major revisions promulgated in 2004.

While these rules are intended to constitute a comprehensive code of criminal procedure for cases in the enumerated courts, nevertheless there are areas of criminal practice which were left unregulated. Among these matters are pretrial diversion, search-and arrest-warrant procedures, wire-tapping procedures, and other similar matters. As to some of these practices, it was determined that the state of the law, especially regarding constitutional issues, was so fluid as to defy codification. These matters were necessarily left to an ad hoc determination on specific facts by the courts. In other areas it was recognized that local practice in individual courts—whether by accepted usage or court rules—could give the criminal justice system some flexibility as required by special conditions not susceptible to general regulation.

These rules are not intended to pre-empt the adoption of rules by the several departments of the Trial Court to address specific problems which are inevitably encountered in those courts and which are not dealt with by these rules.

Nor are these rules intended to be a comprehensive guide or statement with respect to the procedures used by the clerks of court. It is expected that those offices will continue to develop efficient methods to assist in the expeditious disposal of criminal matters consistent with the letter and spirit of these rules.

By a 2004 amendment, Rule 1 was revised to explicitly state that the Rules of Criminal Procedure govern “all delinquency and youthful offender proceedings in the Juvenile Court.” Thus the same rules apply to juvenile court proceedings that apply to delinquency and criminal proceedings in the other trial courts. This accords with M.G.L. c. 218, sec. 59, which provides that “Except as otherwise provided by law, the divisions of the juvenile court department shall have and exercise, within their respective jurisdictions, the same powers, duties, and procedure as the divisions of the district court department; and all laws relating to district courts or municipal courts in their respective counties or officials thereof or proceedings therein, shall, so far as applicable, apply to said divisions of the juvenile court department...” The application of the Rules of Criminal Procedure to juvenile proceedings does not, however, imply that they are identical to adult criminal cases in all other respects. Special procedures for the hearing of juvenile offenses have been established under G.L. c. 119 and are designed to treat juveniles as children in need of aid, encouragement and guidance, rather than as criminals. *Metcalf v. Commonwealth*, 338

Mass. 648, 156 N.E.2d 649 (1959). G.L. c. 119, § 53 directs that proceedings against juveniles under G.L. c. 119 shall not be deemed criminal proceedings, but such matters must still be governed by constitutional due process standards. In re Gault, 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed.2d 527 (1967). Therefore, these rules are intended to be construed liberally so as to comply with the goals and purposes of G.L. c. 119, while G.L. c. 119, § 53 is not to operate to deny the procedural safeguards contained within these rules.

## Rule 2: Purpose; Construction; Definition of Terms

(Applicable to District Court and Superior Court)

### (a) Purpose; Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay.

- (1) Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter.
- (2) When in these rules reference is made to a subdivision of a rule, that reference is to that subdivision and to any subdivisions thereof.

### (b) Definition of Terms

In construing these rules the following words and phrases shall have the following meanings unless a contrary intent clearly appears from the context in which they are used:

- (1) "**Indigent**" means any defendant who is unable to procure counsel with his funds as defined in Supreme Judicial Court Rule 3:10.
- (2) "**Indigent but able to contribute**" means any defendant who is unable to procure counsel with his funds but is able to contribute funds for the cost of counsel as defined in Supreme Judicial Court Rule 3:10.
- (3) "**Capital Crime**" means a charge of murder in the first degree.
- (4) "**Commonwealth**" includes the prosecuting office or agency and all officers or agents responsible thereto.
- (5) "**Court**" includes a judge, special magistrate, or clerk.

- (6) **"District Attorney"** or **"Attorney General"** include assistant district attorneys or assistant attorneys general and other attorneys specially appointed to aid in the prosecution of a case.
- (7) **"District Court"** includes all divisions of the District Court Department of the Trial Court, the Boston Municipal Court Department of the Trial Court, and the Juvenile Court Department of the Trial Court, or sessions thereof for holding court.
- (8) **"Interested Person"** includes the adverse party, a co-defendant, and a witness who is to be deposed.
- (9) **"Judge"** includes a judge of a court or one properly assigned to a court or a special magistrate when in the performance of those duties imposed and authorized by these rules.
- (10) **"Juvenile Court"** means a division of the Juvenile Court Department of the Trial Court, or a session thereof for holding court.
- (11) **"Mailing"** means the use of regular mail and shall not require registered or certified mail.
- (12) **"Prosecuting Attorney"** means the attorney general or assistant attorneys general, district attorney, assistant district attorneys, special assistant district attorneys, or legal assistants to the district attorney, or other attorneys specially appointed to aid in the prosecution of a case.
- (13) **"Prosecutor"** means any prosecuting attorney or prosecuting officer, and shall include a city solicitor, a police prosecutor, or a law student approved for practice pursuant to and acting as authorized by the rules of the Supreme Judicial Court.
- (14) **"Related Offense"** means one of two or more offenses which are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.
- (15) **"Return Day"** means the day upon which a defendant is ordered by summons to first appear or, if under arrest, does first appear before a court to answer to the charges against him, whichever is earlier.
- (16) **"Special Magistrate"** means any person who is appointed pursuant to, and empowered to administer those functions authorized by, Rule 47 of these rules.
- (17) **"Summons"** means
  - (A) criminal process issued to a person requiring him to appear at a stated time and place to answer to criminal charges; or
  - (B) process issued to a person requiring him to appear at a stated time and place to give testimony in a criminal proceeding; or
  - (C) process issued to a person requiring him to appear and produce at a stated time and place books, designated papers, documents, or other objects for use in a criminal proceeding.

(18) "**Superior Court**" means the Superior Court Department of the Trial Court, or a session thereof for holding court.

## Rule History

*Amended May 29, 1986, effective July 1, 1986.*

## Reporter's Notes

Rule 2 is perhaps the most significant of the rules in advancing the trend toward a high degree of procedural fairness in the administration of criminal justice. This is so because the rule not only permits but requires the rules to be construed and applied in a manner which provides for fairness in their administration to the end that a just determination in every criminal proceeding shall be achieved. The rules must be approached with sympathy for this purpose; they must be interpreted with common sense.

The rules were not intended to be administered inflexibly without regard for the circumstances of the particular case. Where a literal interpretation of a rule and its application in a specific situation would lead to unnecessary expense or delay, would unduly complicate the proceedings, or would operate unfairly or produce an unjust result, that interpretation is to yield to the principle enunciated in Rule 2(a).

This is not to imply that the rules were conceived as merely guidelines or suggested procedures to which the courts and counsel need adhere only as will further their particular interests. They have the force and effect of law.

The appellate courts have made it increasingly clear that abuse of power by the prosecution or by trial judges is not to be tolerated. See e.g., S.J.C. Rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer PF 1-14 (Feb. 14, 1979); *Commonwealth v. St. Pierre*, Mass. Adv. Sh. (1979) \_\_\_, \_\_\_ (March 30); *Commonwealth v. Soares*, Mass. Adv. Sh. (1979) 593; *Commonwealth v. Ellison*, Mass. Adv. Sh. (1978) 2072; *Commonwealth v. Earltop*, Mass. Adv. Sh. (1977) 532, 539 (Hennessey, C.J., concurring); *Commonwealth v. Redmond*, 370 Mass. 591 (1976); *Commonwealth v. Sneed*, Mass. Adv. Sh. (1978) 3156. It is equally apparent that a high standard of conduct is demanded of defense counsel. See S.J.C. Rule 3:22A, *supra*, DF 1-15. A disregard for these rules of court or a failure to adhere to their provisions are abuses of the system which can be expected to produce problems in the administration of justice and unfairness to the Commonwealth, defendants, and the public, and which, therefore, should not be tolerated by either the trial or appellate courts.

## *Subdivision (a)*

The language of the first paragraph is drawn virtually without change from Fed. R. Crim. P. 2. These rules are intended to minimize complicated proceedings and needless expense and delay and are to be construed so as to achieve that goal.

The principle of construction stated in subdivision (a)(1) is taken from G.L. c. 4, § 6, cl. fourth, which relates to the construction of the General Laws.

Subdivision (a)(2) is designed to avoid any confusion in reading references to subdivisions. Included in a reference to a subdivision are all paragraphs, subparagraphs, and clauses of that subdivision.

## *Subdivision (b)*

These definitions are to be used in construing these rules unless a contrary interpretation is clearly demanded by the context within which the term is used. See G.L. c. 4, § 7; c. 3, § 63.

### **(1) Appointed Counsel**

This definition is suggested by Superior Court Rule 53(3) (1974); it is to be distinguished from “Assigned Counsel,” *infra*. [Editor’s Note: The term “appointed counsel” was eliminated by the 1986 amendment to Rule 2.]

### **(2) Assigned Counsel<sup>1</sup>**

The terms “appointed counsel” and “assigned counsel” have been used interchangeably in the case law. See e.g., *Costarelli v. Municipal Court of the City of Boston*, 367 Mass. 35 (1975). However, for the purposes of these rules, each term has been given a separate and distinct definition. In these rules, “assigned counsel” means a member of a publicly funded or charitable organization, such as the Massachusetts Defenders Committee (G.L. c. 221, § 34D. See Rule 8[b]), or a county defender. “Appointed counsel” denotes a private attorney who is designated by a judge or magistrate to represent a defendant who cannot afford counsel. Both assigned and appointed counsel may include senior law students appearing without compensation on behalf of indigent defendants as permitted by S.J.C. Rule 3:11 (1974: 366 Mass. 867, as amended, 1975: 367 Mass. 914).

### **(3) Capital Crime**

This definition is drawn from existing case law, e.g., *Commonwealth v. Capalbo*, 308 Mass. 376 (1941); *Commonwealth v. Ibrahim*, 184 Mass. 255 (1903); *Green v. Commonwealth*, 94 Mass. (12 Allen) 155 (1866). Compare G.L. c. 278, § 33E (capital crime defined “for the

---

<sup>1</sup> Publisher’s note: The term “assigned counsel” was eliminated by the 1986 amendment to Rule 2.



purposes of . . . [appellate] review” only). General Laws c. 274, § 2 provides that, “Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.” Therefore, an indictment of a defendant as an accessory before the fact of first degree murder sets out a capital crime. *Grady v. Treasurer of the County of Worcester*, 352 Mass. 702, 704 (1967).

#### (4) Commonwealth

The definition of this term reflects the meaning of the word as commonly used in the case law and statutes.

#### (5) Court

This term is used in the rules to include those officials most intimately involved in the process of adjudicating cases. When so generically used, the word is not to be construed so as to expand or limit those duties traditionally or by law within the prerogative of certain officials.

#### (6) District Attorney or Attorney General

As with “Commonwealth,” *supra*, these terms are used both in the sense of the office and the personnel thereof in their official capacity.

#### (7) District Court

General Laws c. 211B, § 1 (inserted by St. 1978, c. 478, § 110) established the Trial Court of the Commonwealth which consists in part of the Superior Court Department, the District Court Department, the Boston Municipal Court Department, and the Juvenile Court Departments. For ease of reference throughout these rules, the latter three Departments are included within the term “District Court.”

It is in keeping with the policy of these rules to secure simplicity and uniformity in procedure to make the Juvenile Court Department subject to these rules, insofar as they are consistent with juvenile practice. See District Court Special Rule 2 (1974), which applies the rules of the District Court to juvenile proceedings insofar as they are “pertinent.”

#### (8) Interested Person

This term specifies those persons who are entitled to notice of, for example, the filing of motions, Mass. R. Crim. P. 13, 32, or the taking of a deposition, Mass. R. Crim. P. 36.

## (9) Judge

In addition to its accepted meaning, for purposes of these rules this term is to include a magistrate when used in reference to a function which that official is authorized to perform by Mass. R. Crim. P. 48.

## (10) Juvenile Court

See G.L. c. 211B, § 1 (inserted by St. 1978, c. 478, § 110), c. 218, §§ 57-60 (St. 1978, c. 478, §§ 212-16).

The divisions of the Juvenile Court Department, within their respective jurisdictions, have and exercise the same powers, duties, and procedures as the District Court or Municipal Court Departments and are subject to the laws relating thereto, so far as applicable. G.L. c. 218, § 59 (as amended, St. 1978, c. 478, § 215).

## (11) Mailing

It is intended that unless specifically provided for elsewhere in these rules, neither registered nor certified mailing is required.

## (12) Prosecuting Attorney

This term includes those attorneys who prosecute the majority of criminal cases in the Commonwealth.

## (13) Prosecutor

This definition is broader than that of “prosecuting attorney,” and reflects the fact that many cases in the District Courts are prosecuted by a police prosecutor. Under these rules, some prosecutorial functions can be carried on only by a district attorney or attorney general. See e.g., Mass. R. Crim. P. 15(d)(1)(B). A prosecutor may include senior law students appearing on behalf of the Commonwealth pursuant to S.J.C. Rule 3:11 (1974: 366 Mass. 867, as amended, 1975: 367 Mass. 914).

## (14) Related Offense

For further explanation of this definition, see Mass. R. Crim. P. 9 and Reporter’s Notes.

## (15) Return Day

The “return day” is the date upon which a defendant under arrest first appears in court or the date upon which a defendant not under arrest is scheduled to appear pursuant to summons. It is the date upon which speedy trial rights attach (Mass. R. Crim. P. 36[b][1]) and from which other time limits are measured.

## (16) Special Magistrate

The office of “Special Magistrate” is defined in terms of its powers and duties. See Mass. R. Crim. P. 47. Special Magistrates are to be distinguished from “Magistrates in the Trial Court” under G.L. c. 211, §§ 62B-62C (inserted by St. 1978, c. 478, § 250).

## (17) Summons

This definition includes process issued pursuant to Mass. R. Crim. P. 6 and 17. The definitions contained in subdivisions (b)(17)(B) and (C) of this rule replace the older term “subpoena.”

## (18) Superior Court

See G.L. c. 211B, § 1 (inserted by St. 1978, c. 478, § 110), c. 212 (as amended, St. 1978, c. 478, §§ 115-25).

# **Rule 3: Complaint and Indictment; Waiver of Indictment; Probable Cause Hearing**

(Applicable to cases initiated on or after September 7, 2004)

## (a) Commencement of Criminal Proceeding

A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment, except that if a defendant is charged in the District Court with a crime as to which the defendant has the right to be proceeded against by indictment and the defendant has waived the right to an indictment pursuant to subdivision (c), the Commonwealth may proceed in the Superior Court upon the complaint.

## (b) Right to Indictment

A defendant charged with an offense punishable by imprisonment in state prison shall have the right to be proceeded against by indictment except when the offense charged is within the concurrent jurisdiction of the District and Superior Courts and the District Court retains jurisdiction.

## (c) Waiver of Indictment

### *(1) Right to Waive Indictment*

A defendant charged in a District Court with an offense as to which the defendant has the right to be proceeded against by indictment shall have the right, except when the offense charged is a capital crime, to waive indictment, unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule.

### *(2) Procedure for Waiving Indictment*

The defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right in the District Court prior to the determination to bind the case over to the Superior Court for trial. The District Court may for cause shown grant relief from that waiver. After the determination by the District Court to bind the case over to the Superior Court for trial, the defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right, with the consent of the prosecutor, in the Superior Court.

## (d) Transmission of Papers

If the defendant is bound over to the Superior Court for trial after a finding of probable cause or after the defendant waives a probable cause hearing, the clerk of the District Court shall transmit to the clerk of the Superior Court a copy of the complaint and of the record; the original recognizances; a list of the witnesses; a statement of the expenses and the appearance of the attorney for the defendant, if any is entered; the waiver of the right to be proceeded against by indictment, if any is executed; the pretrial conference report, if any has been filed; and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of the General Laws.

## (e) Indictment after Waiver

Notwithstanding the defendant's waiver of the right to be proceeded against by indictment, the prosecuting attorney may proceed by indictment.

## (f) Probable Cause Hearing

Defendants charged in a District Court with an offense as to which they have the right to be proceeded against by indictment and defendants charged in a District Court with an offense within the concurrent jurisdiction of the District and Superior Courts for which the

District Court will not retain jurisdiction, have the right to a probable cause hearing, unless an indictment has been returned for the same offense. If the District Court finds that there is probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the court shall bind the defendant over to the Superior Court. If the District Court finds that there is no probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the court shall dismiss the complaint.

## (g) The Complaint Process

### *(1) Procedure for Obtaining a Complaint*

Any person having knowledge, whether first hand or not, of the facts constituting the offense for which the complaint is sought may be a complainant. The complainant shall convey to the court the facts constituting the basis for the complaint. The complainant's account shall be either reduced to writing or recorded. The complainant shall sign the complaint under oath, before an appropriate judicial officer.

### *(2) Probable Cause Requirement*

The appropriate judicial officer shall not authorize a complaint unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense.

## Rule History

*Amended March 8, 2004, effective September 7, 2004.*

## Reporter's Notes

### *Revised (2004)*

While drawn in part from the General Laws and incorporating many procedures dictated by the case law of the Commonwealth, Rule 3 alters present practice in some respects. As originally promulgated in 1979, Rule 3 was designed to force all noncapital defendants in the District Court who had a right to an indictment to make an election between having their cases considered by a grand jury or obtaining a probable cause hearing. This “forced waiver” provision was rarely used in practice because of concerns that it would infringe on a defendant’s constitutional right to indictment and statutory right to a probable cause hearing. A 2004 amendment to the Rule eliminated the “forced waiver” provision. The rationale for the “forced waiver” provision was based on a concern for efficiency. However, even without forcing a defendant to choose between a probable cause hearing and an

indictment, the prosecutor can prevent unnecessary duplication of procedure simply by indicting the defendant prior to the probable cause hearing. If it is inefficient to have a probable cause hearing, the prosecutor is in the best position to recognize that fact and to take the steps necessary to avoid it. The 2004 amendment also eliminated a reference to juvenile procedure made irrelevant by statute and added provisions describing the complaint process.

## Subdivision (a)

This subdivision in part restates G.L. c. 263, § 4. Approximate parallels may be found in Rules of Criminal Procedure (ULA) Rule 23(a) (1974); ALI Model Code of Pre-Arrest Procedure §§ 330.1(3), 340.1(2) (POD 1975).

General Laws c. 263, § 4 provides that “[n]o person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court...” It is only the issuance of a complaint or an indictment that begins the criminal process, initiates a defendant’s right to counsel under the Sixth Amendment to the United States Constitution, and tolls the statute of limitations. See *Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 560 (1996) (statute of limitations not tolled by application for complaint or citation, but by complaint itself).

The District Courts are empowered by G.L. c. 218, § 32, to “receive complaints and issue warrants and other processes for the apprehension of persons charged with crime...” and pursuant to G.L. c. 218, § 30, shall bind over for trial in the Superior Court defendants who appear to be guilty of crimes not within their final jurisdiction, and may bind over defendants appearing guilty of crimes within their final jurisdiction. Where the charge is by complaint and the accused is under arrest not having been indicted by grand jury, he is entitled “as soon as may be” to a probable cause hearing to determine whether he should be held for trial. G.L. c. 276, § 38.

## Subdivision (b)

This subdivision in large part restates the essentials of prior practice. The right to indictment is not mentioned in the Constitution of the Commonwealth. It was not until 1857 that the Supreme Judicial Court defined that right, holding that “punishment in the state prison is an infamous punishment, and cannot be imposed without...indictment...” *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 349 (1857). Therefore, subdivision (b) affords the right to be proceeded against by indictment to “a defendant charged with an offense punishable by imprisonment in state prison...” that is, Massachusetts Correctional Institution, Cedar Junction. G.L. c. 125, § 1(o). The right to indictment is not extended to defendants charged with a crime within the concurrent jurisdiction of the District and

Superior Courts if the District Court retains jurisdiction. Section 27 of chapter 218 of the General Laws provides in part:

*“[District Courts] may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to state prison.”*

General Laws c. 279, § 23 states that “[n]o sentence of a male convict to imprisonment or confinement for more than two and one half years shall be executed in any jail or house of correction.” General Laws c. 218, §§ 26-27 and c. 279, § 23, when construed together, have led to the settled practice of the District Court, although having jurisdiction of felonies punishable by less than five years at Cedar Junction, sentencing to a jail or house of correction for not more than two and one half years.

Because a defendant tried in District Court is not subject to a sentence to state prison, there is no right to be proceeded against by indictment.

### Subdivision (c)(1)

While intended to secure a benefit to the accused, a grand jury indictment is but the formal accusation or presentation of charges against the accused, see *Commonwealth v. Woodward*, 157 Mass. 516, 518 (1893), and may be waived. See *DeGolyer v. Commonwealth*, 314 Mass. 626, 632-33 (1943); e.g. *Commonwealth v. Thurston*, 419 Mass. 101 (1994). Statutory authorization for such waiver in instances of defendants committed or bound over to the Superior Court for trial was found in former G.L. c. 263, § 4A (St. 1934, c. 358).

A defendant who is bound over to the Superior Court after a finding of probable cause has the right to indictment and the right to waive indictment. However, a defendant charged with a capital crime cannot waive indictment. G.L. c. 263, § 4A (as amended).

If after a waiver of indictment, probable cause is found to bind the defendant over for trial, G.L. c. 218, § 30, the Superior Court shall have as full jurisdiction over the case on the complaint as if an indictment has been found. See *DeGolyer v. Commonwealth*, 314 Mass. 626, 632 (1943).

### (c)(2)

Under the original version of the provision now contained in Rule 3 (c), the judge was required to advise a defendant who had a right to an indictment that he or she might waive indictment and proceed upon the complaint. In the 2004 revision of the rule, the elimination of the “forced waiver” provision made it unnecessary to require that a defendant receive such a warning. The right to waive indictment remains, however, except

in a capital case where the General Laws prohibit it. See G.L. c. 263, § 4A. The defendant may exercise the option to waive indictment in the District Court, before being bound over, or afterward, in Superior Court. In either event, the approval of the judge is not necessary, although the court must ensure that the waiver is valid. This means that it must be intelligent and voluntary, see *DeGolyer v. Commonwealth*, 314 Mass. 626, 632 (1943), and that the defendant either has counsel or has waived the right to the assistance of counsel. The waiver must be in writing.

A juvenile who would otherwise be entitled to an indictment by virtue of G.L. c. 263 § 4 may also waive indictment under the procedure established in this subdivision.

### Subdivision (d)

This subdivision was formerly Rule 3(c)(2) prior to the revision of the Rule in 2004. It generally governs the transmission of the papers in the case after a defendant is bound over to the Superior Court. It is implicit in the rule that the defendant may waive the probable cause hearing to which he or she is entitled thereby proceeding immediately to the Superior Court upon the complaint. E.g. *Commonwealth v. Tanso*, 411 Mass. 640 (1992). Subdivision (d) provides for that contingency.

### Subdivision (e)

If the defendant waives indictment and probable cause is found the case moves immediately to the Superior Court for trial or other disposition unless the Commonwealth chooses to seek an indictment. The prosecution may wish to so proceed because of defects in the complaint, because there are other chargeable crimes—e.g., related offenses arising out of the same criminal episode—or to avail itself of the investigative power of the grand jury.

The prosecutor also has the option of obtaining an indictment in cases where the defendant does not have the right to one and the District Court would otherwise exercise final jurisdiction over the offense. So long as the District Court has not already placed the defendant in jeopardy, cf. *Commonwealth v. Aldrich*, 21 Mass. App. Ct. 221 (1985) (indictment barred by jeopardy where defendant pled guilty to complaint in District Court), the return of an indictment for the same offense as alleged in a complaint is ordinarily sufficient reason for the court to dismiss the complaint. Compare *Commonwealth v. Burt*, 393 Mass. 703 (1985) (judge acted properly in dismissing complaint upon return of indictment) with *Commonwealth v. Raposa*, 386 Mass. 666 (1982) (where judge refused to dismiss complaint upon return of indictment, it was proper for prosecutor to nolle prosequi). The prosecutor should not abuse this power however, such as by waiting until the day of trial to obtain an indictment, see *Raposa*, 386 Mass. at 669 n. 8 (“We would not



look with favor, however, on a prosecutors deliberate obstruction of the criminal process and waste of judicial resources by waiting until the day of trial in the District Court to seek indictments.”), or by removing a case to Superior Court to avoid having to comply with a District Court order denying a continuance, see *Commonwealth v. Thomas*, 353 Mass. 429 (1967).

## Subdivision (f)

This subdivision was added by amendment in 2004.

Defendants whose cases are going to be ultimately disposed of in Superior Court, either because the District Court lacks or declines jurisdiction, are entitled to a probable cause hearing unless the prosecutor obtains an indictment for the same offense charged in the complaint. The return of an indictment constitutes a finding of probable cause and ordinarily renders unnecessary a probable cause hearing. See *Lataille v. District Court of Eastern Hampden*, 366 Mass. 525, 531 (1974). There may be circumstances, however, where the prosecutor’s bad faith in obtaining an indictment entitles the defendant to a probable cause hearing in any event. Cf. *Hadfield v. Commonwealth*, 387 Mass. 252, 257 (1982) (dicta) (circumventing probable cause hearing may be invalid where “effrontery to district court,” “obstruction of criminal process,” or “waste of judicial resources.”); *Commonwealth v. Spann*, 383 Mass. 142, 145 (1981) (if prosecutor promised that defendant would not be indicted before a probable cause hearing and if defendant relied on promise to his detriment, promise would be enforced); *Lataille v. District Court of Eastern Hampden*, 366 Mass. 525, 531 n. 6 (1974) (agreement between counsel might entitle defendant to further pursuit of probable cause hearing which was in progress at time of indictment). Absent these unusual circumstances, however, the ordinary course of events after an indictment has been returned is for the District Court to dismiss the complaint, or for the prosecutor to enter a nolle prosequi, once the defendant has been arraigned in the Superior Court.

If an indictment has not already been returned, a defendant charged with a crime not within the jurisdiction of the District Court must be given a probable cause hearing “as soon as may be.” See G.L. c. 276, § 38. The policy underlying this subdivision looks to liberal granting of continuances to the prosecution in order that indictments may be sought in cases that are scheduled for a probable cause hearing.

Even if the complaint charges a defendant with a crime within the jurisdiction of the District Court (which includes misdemeanors for which there would otherwise be no right to an indictment) the court may hold a probable cause hearing, see G.L. c. 218 § 30, if the judge in the exercise of discretion determines that the interest of justice would be served by

having the Superior Court dispose of the defendant's case. This would typically be the case either to allow the consolidation of cases or in recognition of the exclusive power of the Superior Court to sentence defendants charged with a concurrent jurisdiction felony to state prison. Cf. *Commonwealth v. Zannino*, 17 Mass. App. Ct. 73, 79 (1983) (the power to exercise jurisdiction or to bind the defendant over for trial in the Superior Court "is not to be used arbitrarily, but in view of the circumstances of each particular case"). While it is ordinarily the prosecutor who institutes a request that a matter within the District Court's jurisdiction be treated as a probable cause matter rather than a trial on the merits, the ultimate decision is the judge's. See *Commonwealth v. Zannino*, 17 Mass. App. Ct. 73, 78-79 (1983) ("if the crime charged is within the final jurisdiction of the District Court, the threshold decision whether to conduct a full trial on the merits or only a probable cause hearing is, at least ordinarily, a question for the judge and not the prosecutor").

If a case is within the final jurisdiction of the District Court, the judge must announce that the court is going to decline jurisdiction prior to hearing sworn testimony from any witnesses, which is when jeopardy would otherwise attach in a non-jury trial. See *Commonwealth v. DeFuria*, 400 Mass. 485, 487 (1987); *Crist v. Bretz*, 437 U.S. 28, 37 n.15 (1978). If the court does not make a clear announcement that it is declining jurisdiction, any hearing that follows at which sworn testimony is received will be considered as a trial on the merits at which jeopardy has attached. See *Commonwealth v. Clemmons*, 370 Mass. 288, 291 n.2 (1976); *Corey v. Commonwealth*, 364 Mass. 137, 142 n. 7 (1973). Compare *Commonwealth v. Crosby*, 6 Mass. App. Ct. 679 (1978) (since judge failed to announce that he was declining jurisdiction prior to hearing sworn testimony offered in the course of an admission to sufficient facts, the proceedings constituted a trial on the merits and jeopardy barred the defendant's indictment) with *Commonwealth v. DeFuria*, 400 Mass. 485 (1987) (judge's failure to announce declination of jurisdiction prior to prosecutor's recitation of facts at an admission to sufficient findings did not bar further prosecution since no sworn testimony taken). Cf. *Commonwealth v. Mesrobian*, 10 Mass. App. Ct. 355, 356 n. 2 (1980) ("fundamental fairness dictates that the Commonwealth ought to be required to state unequivocally at the outset of the hearing its intention [to proceed on the basis of probable cause rather than a trial on the merits]"). Since defense strategy at a probable cause hearing differs significantly from that at a trial, the judge should provide notice to the defendant of the decision to decline jurisdiction as far in advance of the hearing as possible. The District Court rules promulgated on January 1, 1996 contemplate that the pretrial hearing is the appropriate stage at which to make the decision. District/Municipal Courts Rules of Criminal Procedure, Rule 4(f).

Whether a probable cause hearing concerns an offense outside the jurisdiction of the District Court or results from a decision of the court to decline jurisdiction over an offense

for which it could have held a trial, the standard that the court should apply at the probable cause hearing to determine whether to bind the case over to the Superior Court is the same. It is the test a trial judge uses to determine a motion for a required finding of not guilty. See *Myers v. Commonwealth*, 363 Mass. 843, 850 (1973) (“The examining magistrate should view the case as if it were a trial and he were required to rule on whether there is enough credible evidence to send the case to the jury. Thus, the magistrate should dismiss the complaint when, on the evidence presented, a trial court would be bound to acquit as a matter of law.”) This standard is more stringent than the one that governs the grand jury’s determination. See *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982) (an indictment cannot stand unless, at a minimum, it is supported by evidence sufficient to establish probable cause to arrest); *Commonwealth v. O’Dell*, 392 Mass. 445, 451-52 (1984) (grand jury requirement of sufficient evidence to establish the identity of the accused and probable cause to arrest him is considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding).

At a probable cause hearing, the defendant must be given a meaningful opportunity to cross-examine witnesses and present evidence on his or her own behalf to assure an accurate appraisal of probable cause. See *Myers v. Commonwealth*, 363 Mass. 843 (1973); *Corey v. Commonwealth*, 364 Mass. 137 (1973). Following the lead of the United States Supreme Court in *Coleman v. Alabama*, 399 U.S. 1 (1970), the Supreme Judicial Court held that a probable cause hearing is such a critical stage in criminal proceedings as to require the assistance of counsel. See *Commonwealth v. Britt*, 362 Mass. 325 (1972). The rules of evidence at a probable cause hearing should in general be the same as are applicable at a trial, that is, a finding of probable cause to hold the defendant for trial “must be based on competent testimony which would be admissible at trial.” *Myers v. Commonwealth*, supra at 849 n. 6. Further, the defendant may have the proceedings taken by a stenographer at his or her own expense, see G.L. c. 221, § 91B; *Commonwealth v. Shea*, 356 Mass. 358, 360-61 (1969); *Commonwealth v. Britt*, 362 Mass. 325, 328-29 (1972) and the transcript is admissible in subsequent proceedings when otherwise competent. See G L c 221, § 91B, c 233, § 80; *Commonwealth v. DiDietro*, 373 Mass. 369 (1977).

If the evidence meets the appropriate standard and the case is bound over to Superior Court, the District Court retains jurisdiction to rule on ancillary matters until an indictment is returned. See *Commonwealth v. Tanso*, 411 Mass. 640, 644 (1992). If the evidence presented at the probable cause hearing does not meet the appropriate standard, the complaint should be dismissed. See *Commonwealth v. Ortiz*, 393 Mass. 523, 524 (1984). Since jeopardy does not attach at a probable cause hearing, see *Commonwealth v. Scala*, 380 Mass. 500, 505 n. 3 (1980), nor is a finding of no probable cause subject to appeal, a District Court’s dismissal based on a failure of the evidence to meet the standard does not

bar a further proceedings, either by way of a subsequent indictment for the same offense, see *Commonwealth v. Juvenile*, 409 Mass. 49, 52 (1991); *Burke v. Commonwealth*, 373 Mass. 157, 160 (1977), or holding another probable cause hearing based on a new complaint, see *Juvenile v. Commonwealth*, 375 Mass. 104, 106 (1978) (“Additional probable cause hearings may be held, especially if additional evidence is to be offered at the subsequent hearing.”). However, if the institution of further proceedings constitutes harassment, the defendant is entitled to relief. See *Juvenile v. Commonwealth*, 375 Mass. 104, 106 n. 1 (1978); *Maldonado*, petitioner, 364 Mass. 359, 364-365 (1973).

## Subdivision (g)(1)

This subdivision and the one following were added to Rule 3 by a 2004 amendment.

The General Laws identify the appropriate judicial officers who play a role in the process of authorizing the issuance of a criminal complaint and administering the oath. See e.g., General Laws c. 218 § 7 (justices and special justices may administer oaths); c. 218 § 10A (deputy assistant clerks may administer oath); c. 218 § 33 (clerks, assistant clerks, temporary clerks, and temporary assistant clerks may receive complaints and administer the oath); c. 218 § 35 (justice or special justice may receive complaints); c. 218 § 37 (justices, special justices, clerks, assistant clerks, temporary clerks and temporary assistant clerks may issue process resulting from a hearing upon an application for a complaint).

General Laws c. 276, § 22 provides that a complainant is to be examined “on oath” and that the complaint is to be “subscribed by the complainant.” The preferred procedure is to administer the oath to the complainant before he or she makes the statements which will serve as the basis for the complaint, but a complaint is still valid if the complainant swears to the truth of statements tendered to the appropriate judicial official after they have been made. See *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 236 (1983). There is no requirement that the statements offered in support of the issuance of a complaint be based on personal knowledge or observation. A complainant may properly present statements of which he or she has no first-hand knowledge. See *Commonwealth v. Dillane*, 77 Mass. (11 Gray) 67 (1858); *Commonwealth v. Cote*, 15 Mass. App. Ct. 229 (1983). Nor does a complainant have to have a personal stake in the matter. See *Commonwealth v. Haddad*, 364 Mass. 795, 797 (1974) (“anyone may make a criminal complaint in a District Court who is competent to make oath to it.”) The practice in many courts where a single officer applies for complaints for offenses of which the officer has no first-hand knowledge is not only appropriate, but a sound administrative procedure. Cf. *District Court Standards of Judicial Practice*, The Complaint Procedure, standard 3:23, commentary at 41-42 (1975). Rule 3(g) (1) authorizes the signing of the complaint by persons other than the arresting

officer in order to avoid requiring the officer's presence at any time prior to the probable cause hearing or trial. The subdivision is grounded in the desire to avoid removing an officer from a regular work shift to execute the mere formality of personally signing the complaint.

The person against whom a complaint is sought does not have a right to be present at the procedure described in this subdivision. See *Commonwealth v. Smallwood*, 379 Mass. 878 (1980). However, in cases where no arrest has been made and all of the offenses the complainant seeks are misdemeanors, see *Commonwealth v. Cote*, supra, 15 Mass. App. Ct. at 235, as well as in certain felony cases, G.L. c. 218 § 35A provides for notice and a hearing before a complaint is authorized, subject to exceptions where there is a risk of bodily injury, commission of a crime, or flight from the jurisdiction.

"The implicit purpose of the § 35A hearings is to enable the court clerk to screen a variety of minor criminal or potentially criminal matters out of the criminal justice system through a combination of counseling, discussion, or threat of prosecution..." Snyder, *Crime and Community Mediation—The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program*, 1978 Wis. L. Rev. 737, 746, quoted with approval in *Gordon v. Fay*, 382 Mass. 64, 69-70 (1980).

This subdivision changes existing practice by requiring that in all cases, the facts on which a complaint is based either be submitted in writing or, in the discretion of the appropriate judicial official, conveyed orally so long as the oral statement is transcribed or otherwise recorded. The facts on which the complaint is based may be memorialized in any of the following three ways. First is a written statement submitted by the complainant. The written account of the facts can come from a police report, from a motor vehicle citation, see G.L. c. 90C § 3(B)(2), from a statement memorialized on the form for an application for a complaint promulgated by the District Courts, see *District/Municipal Courts Rules of Criminal Procedure*, Rule 2 (effective Jan. 1, 1996), or from any other written source. Second is a written statement made by the appropriate judicial official based on information conveyed by the complainant. And third is to record an oral statement by the complainant. Nothing in this subsection is intended to require the recording of hearings under G.L. c. 218 § 35A.

A number of other jurisdictions follow the practice of requiring the basis for a criminal complaint to be memorialized. See *Fed. Rules Crim. Pro.*, Rules 3 & 4; *Colo. Rules Crim. Pro.*, Rule 4(a); *Minn. Rules Crim. Pro.*, Rule 2.01; *R.I. Rules Crim. Pro.*, Rule 3. The purpose of this requirement is twofold. First, requiring a record of the facts presented to the court will protect the integrity of the complaint process. And second, in those cases where a defendant has the right to litigate the basis on which a complaint was issued, see e.g.,

Commonwealth v. DiBennadetto, 436 Mass. 310 (2002), the existence of a record will facilitate judicial review.

## (g)(2)

This subdivision changes the existing practice concerning the authorization of criminal complaints in some cases.

Under prior practice, where a complaint was sought against an individual who had been arrested, the appropriate judicial officer did not evaluate the justification for initiating criminal proceedings. It was only if the complainant applied for process to issue, either a summons or warrant, that a determination of probable cause was necessary. Standards of Judicial Practice: The Complaint Procedure, 2:03, Administrative Office of the District Courts (1975). Under this subdivision, a finding of probable cause must be made for all cases, whether the defendant has been arrested or not. In requiring a probable cause determination in every case, this subdivision follows the federal model, see Fed. Rules Crim. Pro. 4(a) & 5(a), and that of a number of other states, e.g., Conn. Practice Book, § 617; Minn. Rules Crim. Pro., Rule 2.01; N.J. Rules Crim. Pro., Rule 3:4-1(a).

The consequence, if any, of the failure of the record in a particular case to demonstrate probable cause is a matter that the rule does not address. The Supreme Judicial Court, in Commonwealth v. DiBennadetto, supra at 313, has held, however, that where a complaint was authorized after a §35A hearing, “the issuance of [the] complaint...is not to be revisited by a further show cause hearing; the defendant’s remedy is a motion to dismiss.”

The purpose of a probable cause determination prior to the authorization of a complaint is to screen out cases that do not belong in the criminal justice system at the earliest possible stage. The standard of probable cause to authorize a complaint is the same as the standard that governs the grand jury’s decision to issue an indictment. “[A]t the very least the grand jury must hear sufficient evidence to establish the identity of the accused...and probable cause to arrest him.” Commonwealth v. O’Dell, 392 Mass. 445, 450 (1984), quoting Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). As in the grand jury or arrest context, the probable cause determination at this stage of the process may be based on hearsay. All that is required is “reasonably trustworthy information...sufficient to warrant a prudent man in believing that the defendant had committed...an offense,” O’Dell, 392 Mass. at 450. This standard is considerably less exacting than the one that a judge must apply at a probable cause hearing under subdivision (f). Id. at 451. If a case cannot even meet the standard necessary under subdivision (g), it would be a waste of judicial

---

<sup>2</sup> Publisher’s note: This is an error and the correct citation should be 392 Mass. at 450.

resources and an unnecessary burden on the individual for the case to move any further in the process.

This subsection does not alter existing case law that gives courts in circumstances where a private citizen is a complainant, the power to refuse to issue a complaint even though there is probable cause to do so. See *Victory Distributors v. Ayer Division of the District Court Dept.*, 435 Mass. 136 (2001). Where the Commonwealth seeks a complaint, however, the court must issue it so long as it is legally valid. *Id.* Although there is no explicit provision in the Rules of Criminal Procedure for the process that follows from an initial denial of an application for a complaint, the Supreme Judicial Court has held that judges have inherent authority to rehear such applications. See *Bradford v. Knights*, 427 Mass. 748 (1998).

## **Rule 3.1: Determination of Probable Cause for Detention**

(Applicable to cases initiated on or after September 7, 2004)

- (a) No person shall be held in custody for more than twenty-four hours following an arrest, absent exigent circumstances, unless:
  - (i) a warrant or other judicial process authorizes the person's detention,
  - (ii) a complaint has been authorized under Rule 3 (g), or
  - (iii) a determination of probable cause for detention has been made pursuant to subsection (b).
- (b) A determination of probable cause for detention shall be made by an appropriate judicial officer. The appropriate officer shall consider any information presented by the police, whether or not known at the time of arrest. The police shall present the information under oath or affirmation, or under the pains and penalties of perjury. The police may present the information orally, in person or by any other means, or in writing. If presented in writing, the information may be transmitted to the appropriate judicial officer by facsimile transmission or by electronic mail or by such other electronic means as may be found acceptable by the court. The determination of probable cause for detention shall be an ex parte proceeding. The person arrested has no right to appear, either in person or by counsel.
- (c) Where subsection (a) requires a determination of probable cause for detention, the police shall present the information necessary to obtain such determination to the appropriate judicial officer as soon as reasonably possible after the arrest, but no later than twenty-four hours after arrest, absent exigent circumstances.

- (d) The judicial officer shall promptly reduce to writing his or her determination as to probable cause and notify the police. A copy of the written determination shall be transmitted to the police, by facsimile transmission or by other means, as soon as possible.
- (e) The judicial officer shall apply the same standard in making the determination of probable cause for detention as in deciding whether an arrest warrant should issue. If the judicial officer determines that there is probable cause to believe the person arrested committed an offense, the judicial officer shall make a written determination of his or her decision which shall be filed with the record of the case together with all the written information submitted by the police.
- (f) If there is not probable cause to believe that the person arrested committed an offense, the judicial officer shall order the person's prompt release from custody. The order and a written determination of the judicial officer shall be filed in the District Court having jurisdiction over the location of the arrest, together with all the written information submitted by the police. These documents shall be filed separately from the records of criminal and delinquency cases, but shall be public records.

## Rule History

*Added March 8, 2004, effective September 7, 2004.*

## Reporter's Notes

### *Revised (2004)*

Rule 3.1 was added in 2004 to implement the requirements described by the Supreme Judicial Court in *Jenkins v. Chief Justice of the District Court Department*, 416 Mass. 221 (1993), dealing with the topic of obtaining a judicial determination of probable cause for persons held in custody after a warrantless arrest. It is based on the procedure promulgated in 1994 by Trial Court Rule XI. The only major substantive change that Rule 3.1 makes in the procedure dictated by Trial Court Rule XI is in the standard to use in determining if the custody of the individual is lawful. Trial Court Rule XI directed the “judicial officer [to determine whether]...there is probable cause to believe that such arrestee committed one or more of the offenses for which he or she was arrested.” Rule 3.1 directs the judicial officer to determine if “there is probable cause to believe the person arrested committed an offense.” The language of Rule 3.1 more accurately focuses on the appropriate issue that is crucial to the question of the legality of an individual’s detention prior to being brought to court.



## Subdivision (a)

In *Jenkins*, the Court held that Article 14 of the Declaration of Rights requires the police to obtain a judicial determination of probable cause as soon as reasonably possible after they have made a warrantless arrest, which in the usual circumstances means no more than twenty-four hours. This subdivision identifies the only four exceptions to the police following the procedure that the balance of Rule 3.1 establishes. One is when the arrestee will not be held more than twenty-four hours. For example, if the police have arrested someone who is going to be bailed at the police station within twenty-four hours, Rule 3.1 is not applicable. Another is when the arrest was based on process issued by a judicial officer, such as an arrest warrant, or when process exists which authorizes the detention of an arrestee on another charge. In the former circumstance, the police are merely executing a judicial order rather than making an independent judgment to deprive someone of their liberty. In the latter circumstance, where for example the police arrest someone without a warrant and then discover that there is a pre-existing outstanding warrant for the arrestee, there is already judicial authorization to deprive the arrestee of his or her liberty. The third is when a complaint charging the arrestee with a crime has already been authorized under Rule 3(g), which independently requires a judicial officer to make the same sort of probable cause determination as Rule 3.1 contemplates. Last is when exigent circumstances exist which make it not possible to obtain judicial approval for an extended deprivation of the arrestee's liberty.

## Subdivision (b)

This subsection describes the procedure for a determination of probable cause for detention after a warrantless arrest. It requires the police to present the information that supports a deprivation of an arrestee's liberty to an appropriate judicial officer. These officials include judges and those individuals in the clerk-magistrate's office who are empowered to authorize complaints. See Reporters' Notes to Rule 3(g); G.L. c. 218 § 33. The Court held in *Jenkins*, 416 Mass. at 337-38 that: "like the issuance of a warrant, the postarrest determination need not necessarily be made by a judge. See *Commonwealth v. Smallwood*, 379 Mass. 878, 885, 401 N.E.2d 802 (1980) ("While District Court judges are authorized to receive complaints and issue warrants, G. L. c. 218, § 32, a clerk or assistant clerk may also receive complaints, administer the required oath, and issue warrants in the name of the court. G. L. c. 218, § 33. *Commonwealth v. Penta*, 352 Mass. 271, 273, 225 N.E.2d 58 [1967]")."

The police may present the appropriate judicial officer with the information providing probable cause for the arrestee's detention in writing or orally. This subdivision contemplates that the medium of providing the information be as flexible as possible.

Physical submission of a written report, faxed copies or e-mail are all appropriate, as are telephone conversations. No matter how the police submit the information, however, it should be sworn to under oath or affirmation. The arrestee has no right to appear or participate at this proceeding, either in person or through counsel. See *Jenkins*, 416 Mass. at 244-45.

### Subdivision (c)

This subsection directs the police to present the information justifying the detention of an arrestee's liberty within twenty-four hours of the arrest, unless there are exigent circumstances. The exception for exigent circumstances addresses situations such as communication failures and natural disasters and not exigencies that relate solely to the investigative needs of the police.

### Subdivision (d)

This subsection incorporates essentially the same requirement for reducing the results of a determination of probable cause for detention to writing and transmitting it to the police as contained in Trial Court Rule XI(e).

### Subdivision (e)

This subdivision deals with the standard that governs the determination of probable cause for detention and the consequence of an affirmative finding. As to the first of these issues, the subdivision addresses two questions: what the standard should be and the issues to which the standard should be applied. The Court in *Jenkins* held that the Declaration of Rights requires a postarrest determination of probable cause to be "governed by the same legal standards as apply to the issuance of a warrant." *Jenkins*, 416 Mass. at 239. Rule 3.1 follows Trial Court Rule XI (b), in adopting this same familiar standard as the measure of whether further detention of an arrestee is warranted. However, the subdivision differs from Trial Court Rule XI (b) in the question of what issues must meet this standard. The Trial Court Rule focused on whether the individual committed one or more of the offenses for which he or she was arrested. This subdivision focuses on whether there is probable cause to believe individual committed any offense.

The procedure that Rule 3.1 addresses is directed to the question of probable cause for the arrestee's detention, not whether probable cause existed to justify the person's arrest. Given the nature of the determination, the legality of the arrestee's detention should not depend on the ability of the police accurately to identify the precise offense for which the person should be held. For example, it is sometimes the case that police with probable cause to arrest someone for a particular crime put down the wrong offense on the documents they fill out afterwards. Under the language of Trial Court Rule XI (d), such a

person would have to be released despite clear probable cause to charge him or her with the correct crime. Under Rule 3.1, the police could detain such an individual and charge him or her with the appropriate offense. The approach that Rule 3.1 takes to this issue is similar to the rules of other jurisdictions. See Fla. R. Crim. Pro., Rule 3.133(a)(3); Me. R. Crim. Pro., Rule 5(d); Minn. R. Crim. Pro., Rule 4.03.

The subdivision also addresses the issue of the consequence of a determination that there exists probable cause for detention. If probable cause exists, a written finding together with the supporting documents are to be filed with the record of the case. A defendant does not have the right to have the probable cause determination reviewed at arraignment. By the time a defendant subject to the process described in Rule 3.1 is arraigned, a judicial officer not only will have made a determination of probable cause for detention, but also a determination pursuant to Rule 3(g) that probable cause exists for each of the offenses with which the defendant has been charged. There is no need for a judge at arraignment routinely to reconsider the matter of probable cause.

### Subdivision (f)

This subdivision deals with the issue of the consequence of a determination that there does not exist probable cause for detention. It is essentially the same in this regard as Trial Court Rule XI (e)(3).

## **Rule 4: Form and Contents of Complaint or Indictment; Amendment**

(Applicable to District Court and Superior Court)

### **(a) Contents of Indictment or Complaint**

An indictment and a complaint shall contain a caption as provided by law, together with a plain, concise description of the act which constitutes the crime or an appropriate legal term descriptive thereof.

## (b) Subscription of Application for Issuance of Process

An application for issuance of process may be subscribed by the arresting officer, the police chief, or any police officer within the jurisdiction of a crime, a prosecutor, or a private person.

## (c) Indictment Based Upon Secondary Evidence

An indictment shall not be dismissed on the grounds that the evidence presented before the grand jury consisted in whole or in part of the record from the defendant's probable cause hearing or that other hearsay evidence was presented before the grand jury.

## (d) Amendment

Upon his own motion or the written motion of either party, a judge may allow amendment of the form of a complaint or indictment if such amendment would not prejudice the defendant or the Commonwealth.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

### *Subdivision (a)*

Rule 4(a) is a restatement of Massachusetts statutory law. A caption is required for indictments and complaints by G.L. c. 277, §§ 17, 79. See 30 Mass. Practice Series (Smith) § 342 (1970). Although the indictment or complaint may contain more than one count (see Mass. R. Crim. P. 9[a][2], [b]), a single caption is sufficient. G.L. c. 277, §§ 17, 79.

The statement of the charges can be in the form of a description of the criminal act or in the form of a legal term descriptive of the act. "The words used in a statute to define a crime, or other words conveying the same meaning, may be used." G.L. c. 277, § 17. An indictment or complaint must, however, set forth all the elements of the crime charged and if a statute does not contain all those elements, an indictment or complaint drawn in terms of that statute is insufficient. G.L. c. 277, § 17; *Commonwealth v. Palladino*, 358 Mass. 28 (1970). The forms established by G.L. c. 277, § 79 contain sufficient descriptions of the crimes listed therein.

To survive a motion to dismiss, an indictment (together with a bill of particulars, if any. See Rule [13][b]) must describe the offense charged “‘fully, plainly, substantially and formally,’ with as much certainty as the known circumstances of the case . . . [will] permit.”

Commonwealth v. Soule, Mass. App. Ct. Adv. Sh. (1979) 69 (Rescript). Accord

Commonwealth v. Burke, 339 Mass. 521, 523 (1959); Commonwealth v. Gill, 5 Mass. App. Ct. \_\_\_, \_\_\_ (1977), Mass. App. Ct. Adv. Sh. (1977) 581, 582-83.

### *Subdivision (b)*

General Laws c. 276, § 22 provides that a complainant is to be examined “on oath” and that the complaint is to be “subscribed by the complainant.” While this requirement has been strictly construed, Commonwealth v. Barhight, 75 Mass. (9 Gray) 113 (1857), there is no requirement that the statements offered in support of the issuance of process be based on personal knowledge or observation. A complainant may properly present statements of which he has no first-hand knowledge. Commonwealth v. Dillane, 77 Mass. (11 Gray) 67 (1858). The practice in many courts where a single officer presents applications for issuance of process for offenses of which he has no first-hand knowledge is not only appropriate, but a sound administrative procedure. District Court Standards of Judicial Practice, THE COMPLAINT PROCEDURE, standard 3:23, commentary at 4142 (1975). Rule 4(b) authorizes the signing of the complaint by persons other than the arresting officer in order to avoid requiring the officer’s presence at any time prior to the probable cause hearing or trial. The subdivision is grounded in the desire to avoid removing an officer from his regular work shift to execute the mere formality of personally signing the complaint.

### *Subdivision (c)*

This subdivision of the rule refers to hearsay and other types of evidence which may be inadmissible at trial, but may properly be considered by a grand jury. Commonwealth v. Gibson, 368 Mass. 518 (1975), reaffirmed the long-recognized rule in the Commonwealth that evidence which is not legally competent at trial is sufficient upon which to base an indictment, and that an indictment which is in fact based exclusively upon hearsay will not be invalidated at trial for that reason. Commonwealth v. Woodward, 157 Mass. 516 (1893); Commonwealth v. Walsh, 255 Mass. 317 (1926); Commonwealth v. Ventura, 294 Mass. 113 (1936); Commonwealth v. Lammi, 310 Mass. 159 (1941); Commonwealth v. Geagan, 339 Mass. 487 (1959), cert. denied, 361 U.S. 895; Commonwealth v. Monahan, 349 Mass. 139 (1965); Commonwealth v. Beneficial Finance Co., 360 Mass. 188 (1971).

The United States Supreme Court, in Costello v. United States, 350 U.S. 359 (1956), disposed of constitutional arguments against the practice, holding “[a]n indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for a trial of

the charge on the merits. The Fifth Amendment requires nothing more.” *Id.* at 363. The Court affirmed and expanded upon this holding in *United States v. Dionisio*, 410 U.S. 1 (1973), in which it stated that: “A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge.” *Id.* at 15. More recently, that Court has said, “[t]he grand jury’s sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered.” *United States v. Calandra*, 414 U.S. 338, 344-45 (1974).

### *Subdivision (d)*

This subdivision for the most part restates prior Massachusetts practice. The substance of this subdivision was taken from G.L. c. 277, § 35A, but a significant modification of the statute has been effected. The change involves the expansion of the right to seek amendments. Under the statute, only the prosecutor could move for amendment of a complaint or indictment; under the rule either party can seek amendments, and the court can allow amendments on its own motion.

It is preferable that a party seeking an amendment of the charges file a written motion to that effect in order that a sufficient record be preserved on that issue should there be an appeal. However, a court may allow an amendment upon oral motion. In such event, or in the event that the court amends the charges on its own motion, the court should make certain that the amendment, as well as the charges as originally framed, are made a part of the record.

The most common prejudice resulting from an amendment of the charges is that the amendment materially alters the substantive offense charged. See *Commonwealth v. Gallo*, 2 Mass. App. Ct. 636 (1974). Such an amendment would be one of substance and not of form and would thus be impermissible. *Commonwealth v. Snow*, 269 Mass. 598, 603 (1930). An unessential element of a crime charged in an indictment or complaint, such as the time of stealing in larceny, may be amended without prejudice to the defendant. *Commonwealth v. Jervis*, 368 Mass. 638, 643-44 (1975). See *Commonwealth v. Grasso*, Mass. Adv. Sh. (1978) 1162, 1164; *Commonwealth v. Sitko*, Mass. Adv. Sh. (1977) 668, 669-70.

One test for determining whether an amendment is one of substance or of form is whether an acquittal on the original charge would act as a bar on double jeopardy grounds to a prosecution of the defendant on the amended charges. If not, then the amendment would be deemed one of substance rather than of form. *Commonwealth v. Snow*, *supra*.

Although the power of the court to amend indictments under this rule and under existing statutory law is the same as its power to amend complaints, it should be noted that the restrictions on its power to allow amendment of indictments reaches constitutional dimensions. Since defendants charged with felonies have the constitutional right to indictment (*Jones v. Robbins*, 74 Mass. [8 Gray] 329 [1857]; see Reporter's Notes to Rule 3, *supra.*), an amendment which goes to the substance of the offense charged in an indictment so as to "materially change the work of the grand jury" interferes with the defendant's right to have a grand jury frame those charges upon which he is to be tried. *Commonwealth v. Benjamin*, 358 Mass. 672, 679 (1971); *Commonwealth v. Ohanian*, Mass. App. Ct. Adv. Sh. (1979) 14 (Rescript).

As to complaints, the power of the court is not so restricted. Therefore, the District Court judge should review each complaint carefully to assure that it fulfills the statutory requirements. If it does not, the judge should order it amended. This course of action will prevent defective complaints from entering the Superior Court system after a waiver of indictment. Further, if during a probable cause hearing it appears to the judge that the evidence would warrant charges of other or related offenses, he should order a new complaint to be prepared.

## Rule 5: The Grand Jury

(Applicable to cases initiated on or after September 7, 2004)

### (a) Summoning Grand Juries

#### *(1) Selection of Grand Jurors*

As prescribed by law, the appropriate number of jurors shall be summoned in the manner and at the time required, from among whom the court shall select not more than twenty-three grand jurors and may select up to four alternate grand jurors to serve in said court as long as and at those specific times required by law, or as required by the court. In the exercise of discretion, a judge may replace a sitting grand juror with an alternate grand juror upon a finding of hardship, inconvenience, public necessity, or other good cause shown. When the public interest so requires, a judge may empanel a second grand jury and both shall be subject to the same laws, rules, and requirements.

#### *(2) Place and Time of Sitting*

The regular grand jury shall be called upon and directed to sit by the Chief Justice of the Superior Court Department whenever and wherever within the Chief Justice's discretion

the conduct of regular criminal business and timely prosecution within a particular county so dictate. Notwithstanding the foregoing, special grand juries shall be summoned in the manner prescribed by the General Laws.

## (b) Foreperson, Foreperson Pro Tem, Clerk, Clerk Pro Tem

### *(1) Election of Foreperson and Clerk*

After the grand jurors have been empanelled they shall retire and elect one of their number as foreperson and one of their number as clerk. The foreperson and the prosecuting attorney shall have the power to administer oaths and affirmations to witnesses who appear to testify before the grand jury, and the foreperson shall, under the foreperson's hand, return to the court a list of all witnesses sworn before the grand jury during the sitting.

### *(2) Election of Foreperson Pro Tem*

If the foreperson is unable to serve for any part of the period the grand jurors are required to serve, a foreperson pro tem shall be elected in the same manner as provided herein for election of the foreperson. The foreperson pro tem shall serve until the foreperson returns or for the remainder of the term if the foreperson is unable to return.

### *(3) Clerk*

The clerk shall be charged with keeping a record of their proceedings, and, if the grand jury so directs, to deliver such record to the attorney general or district attorney. If the clerk is unable to serve for any part of the period the grand jurors are required to serve, a clerk pro tem shall be elected.

## (c) Who May Be Present

Attorneys for the Commonwealth who are necessary or convenient to the presentation of the evidence, the witness under examination, the attorney for the witness, and such other persons who are necessary or convenient to the presentation of the evidence may be present while the grand jury is in session. The attorney for the witness shall make no objections or arguments or otherwise address the grand jury or the prosecuting attorney. No witness may refuse to appear because of unavailability of counsel for that witness.



## (d) Secrecy of Proceedings and Disclosures

The judge may direct that an indictment be kept secret until after arrest. In such an instance, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his or her official duties or when specifically directed to do so by the court. No obligation of secrecy may be imposed upon any person except in accordance with law.

## (e) Quorum, Finding, and Return of Indictment

A quorum of thirteen grand jurors must be present to hear any evidence, consider any proposed indictment, or take any other official action. An indictment may be found only upon the concurrence of twelve or more jurors. The indictment shall be returned by the grand jury to a judge in open court unless for reasons of public safety or security the judge decides to take the return of the indictment remotely.

## (f) No Bill; Discharge of Defendant

The grand jury shall during its session make a daily return to the court of all cases as to which it has determined not to present an indictment against an accused. Each such complaint shall be endorsed "no bill" and shall be filed with the court. If upon the filing of a no bill the accused is held on process, that person shall be discharged unless held on other process.

## (g) Deliberation

A prosecutor shall not be present during deliberation and voting except at the request of the grand jury. If a prosecutor is present during deliberation and voting, the prosecutor shall be permitted to answer only questions of law.

## (h) Discharge

A grand jury shall serve until the first sitting of the next authorized grand jury unless it is discharged sooner by the court or unless its service is extended to complete an investigation then in progress.

## (i) The Record of Proceedings

All grand jury proceedings, except the grand jury's own deliberations, shall be recorded in a manner that permits reproduction and transcription. This shall include, but not be limited to, empanelment, removal of any grand juror, legal instructions provided to the grand jury by a judge or a prosecutor in connection with the proceeding, questions to a prosecutor from a grand juror and the prosecutor's responses, before or during deliberations, and a record of all those present during the proceedings, excluding the names of the grand jurors.

## Rule History

*Amended March 8, 2004, effective September 7, 2004; amended April 25, 2022, effective May 1, 2022.*

## Reporter's Notes

### (2022)

These amendments to Mass. R. Crim. P. 5 codify existing law and practice concerning basic aspects of grand jury selection and operation. Several of the amendments were proposed by the Supreme Judicial Court's Committee on Grand Jury Proceedings in its Final Report to the Justices (June 2018). The amendments address (1) the selection and use of alternate grand jurors, (2) the empaneling of a second grand jury, (3) the quorum for a grand jury, (4) the permissible scope of the prosecutor's presence during grand jury deliberation, and (5) the requirement for recording of the grand jury proceeding. The amendments also eliminate references to gender and add headings for readability.

The amendment to Mass. R. Crim. P. 5 (a) provides for empaneling alternate grand jurors. While Mass. R. Crim. P. 20 (d) provides for empaneling alternate trial jurors, the Rules did not authorize selection of alternate grand jurors. Grand jurors face the same issues of illness or disability as do trial jurors, exacerbated because grand jurors typically sit for far longer periods than do trial jurors. See *Commonwealth v. Wilcox*, 437 Mass. 33, 37 (2002). General Laws c. 277, § 4 already provides for the replacement of grand jurors, and selection of alternates at the start of the process avoids delay if replacement becomes necessary. The replacement of a grand juror with an alternate is committed to the sound discretion of the judge, upon a showing of good cause.

While the availability of alternate grand jurors will enable them, like alternate trial jurors, to hear the evidence and witnesses presented to the grand jury, under the Supreme Judicial Court's "practical' view of grand jury proceedings . . . [a] grand juror need not have heard all

the evidence presented against a defendant in order to vote to return an indictment.” *Commonwealth v. Walczak*, 463 Mass. 808, 845 (2012) (Spina, J., concurring in part) (citing *Wilcox*, *id.*). This amendment to Mass. R. Crim. P. 5 (a) also eliminates references to gender.

The amendment to Mass. R. Crim. P. 5 (b) eliminates references to gender and adds headings for readability. It also clarifies that the same method is used for selecting the foreperson and the clerk, as well as the foreperson pro tem and the clerk pro tem, by eliminating the unintentional suggestion in the rule of any difference between electing the foreperson and appointing the clerk.

The amendment to Mass. R. Crim. P. 5 (d) eliminates references to gender.

The amendment to Mass. R. Crim. P. 5 (e) codifies, for convenience, the well-established common law minimum size for a grand jury to hear evidence or take action as thirteen. *Commonwealth v. Wood*, 56 Mass. (2 Cush) 149 (1848), accord, *Crimm v. Commonwealth*, 119 Mass. 326, 331 (1876). Unlike the maximum number of grand jurors (set forth in Rule 5 (a) (1)),

this size for a quorum has not been in the rule where it can be easily found. While a grand jury requires at least thirteen members for a quorum, only twelve need assent to an indictment. Mass. R. Crim. P. 5 (e); *Commonwealth v. Smith*, 9 Mass. 107, 109 (1812). In addition, the amendment recognizes that an indictment, usually returned in open court, may be returned remotely when necessary.

The amendment to Mass. R. Crim. P. 5 (f) eliminates references to gender.

The amendment to Mass. R. Crim. P. 5 (g) clarifies that if at the request of the grand jury the prosecutor is present during deliberation and voting, the prosecutor should not comment on factual questions but should answer only questions of law. This longstanding rule in Massachusetts was also recognized as a best practice by the Supreme Judicial Court’s Committee on Grand Jury Proceedings. Final Report at 21-23. See also, *Attorney General v. Pelletier*, 240 Mass. 264, 310 (1922) (Prosecutor present during deliberations at grand jury’s request “cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action. His duty is ended when he has laid before the grand jury the evidence and explained the meaning of the law.”).

The amendment adding section (i) to Mass. R. Crim. P. 5 implements *Commonwealth v. Grassie*, 476 Mass. 202, 220 (2017), in which the Court held that the entire grand jury proceedings, except deliberations, must be recorded in a manner that permits reproduction and transcription. The recording shall also include any legal instructions and

communications to the grand jury by a judge or a prosecutor, and a record of all present excluding the names of the grand jurors.

If, at the request of the grand jury, a prosecutor is present for any of the grand jury's deliberations and voting, any communication by the prosecutor or instruction relating to a question of law should be recorded. *Grassie*, 476 Mass. at 220. As the Supreme Judicial Court's Committee on Grand Jury Proceedings noted in its Final Report, "Grand jury proceedings should never go 'off the record.'" Final Report at 20. (Citing *E.B. Cypher*, *Criminal Practice and Procedure* § 26.13 (4th ed. 2014)).

## (2004)

Rule 5 is modeled in large part upon Fed. R. Crim. P. 6 and substantially conforms to the General Laws.

### Subdivision (a)

This subdivision is drawn from Fed. R. Crim. P. 7(a) and G.L. c. 277, §§ 1, 2, 2A-2H. General Laws c. 277, § 3 provides that grand jurors are to be drawn, G.L. c. 234, §§ 17-24C, summoned, G.L. c. 234, §§ 10-14, 16, 24, and returned in the same manner as traverse jurors from a list compiled in compliance with G.L. c. 234, §§ 4-9. By a 2004 amendment, this subdivision was amended to eliminate a reference to a specific number of veniremen who must be summonsed, since the number differs from county to county. The statutes require that twenty-three jurors be selected to make up the grand jury, G.L. c. 277, §§ 1, 2, 2A-2H, and authorize the issuance of writs of venire facias to fill any deficiency in that number. G.L. c. 277, § 4. A number less than twenty-three is competent to return an indictment, however, so long as at least thirteen are present and twelve concur in the return. See *Commonwealth v. Wood*, 56 Mass. (2 Cush) 149 (1848). Accord, *Crimm v. Commonwealth*, 119 Mass. 326 (1876).

Subdivision (a) generally governs the time of issuance of writs of venire facias and provides that such writs for special grand juries shall be issued pursuant to G.L. c. 277, § 2A. In addition to the statutory regular and special grand jury sitting, the Administrative Justice of the Superior Court is empowered to call a "regular" grand jury session whenever the amount of criminal business and the need for timely prosecution within a particular county requires. This provision is intended to provide the Superior Court with much needed flexibility in responding to the fluctuating demand for grand jury action among counties.

### Subdivision (b)

Although similar to Fed. R. Crim. P. 6(c), this subdivision is wholly adopted from former G.L. c. 277, §§ 7-10. The federal rule provides for the simultaneous court appointment of a

foreperson and deputy foreperson; under Rule 5 the foreperson is elected by the other jurors and a replacement, the foreperson pro tem, is chosen only if the first cannot serve. Provision for a clerk pro tem is new with this rule.

Those parts of subdivision (b) dealing with the administration of oaths and listing of witnesses and with the appointment and duties of the clerk are restatements, respectively, of former G.L. c. 277, §§ 9 and 10.

## Subdivision (c)

This subdivision was patterned on Fed. R. Crim. P. 6(d), although it omitted the provision of the federal rule that excluded all persons other than jurors from deliberations or voting.

Grand jury proceedings are ordinarily secret and the presence of an unauthorized person will void an indictment. See *Commonwealth v. Pezzano*, 387 Mass. 69, 72-73 (1982). The importance of keeping the grand jury process from becoming public rests on several policy considerations: preventing individuals from facing the notoriety associated with a grand jury investigation unless probable cause is found against them and an indictment is returned; shielding the grand jury from any outside influences having the potential to distort their investigatory or accusatory functions; protecting witnesses from improper influence; encouraging the full disclosure of information to the grand jury; and facilitating the freedom of the grand jury's deliberations. See *WBZ-TV4 v. District Attorney for Suffolk Dist.*, 408 Mass. 595, 600 (1990).

However, prior to the adoption of Rule 5, the Supreme Judicial Court recognized that grand jury secrecy would not be compromised by the presence of persons who were necessary to the work of the grand jury. For example, *Commonwealth v. Favulli*, 352 Mass. 95 (1967), held that a prosecutor has discretion as to the use of assistants and may have present such reasonable number as he or she deems appropriate to the efficient presentation of the evidence. *Id.* at 106. Accord, *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 207-09 (1971) (no greater number than is "necessary"). Besides the jury, the prosecutors and the witness under examination, other persons "necessary or convenient to the presentation of the evidence" may include counsel for a witness (G.L. c. 277, § 14A), an interpreter, an officer to guard a dangerous prisoner-witness, an attendant for a sick witness (see 30 Mass. Practice Series [Smith] § 812 [1970]), a stenographer (G.L. c. 221, § 86), or the operator of a recording device. It should be noted that G.L. c. 221, § 86, which permits the appointment of a stenographer to take notes of testimony given before a grand jury does not authorize the recording of any statement or testimony of a grand juror.

The provision in Rule 5(c) allowing the prosecutor to be present at request of grand jurors does not deny defendant due process. See *Commonwealth v. Smith*, Mass. 437 (1993).

Under this subdivision, it may be proper for a federal prosecutor who was involved in the investigation of the case, see *Commonwealth v. Angiulo*, 415 Mass. 502, 513 (1993) or a victim-witness advocate accompanying a child witness, see *Commonwealth v. Conefrey*, 410 Mass. 1, 7 (1991) to be present during testimony before the grand jury. However, it is ordinarily not proper for a police officer to be present, except as a witness. See *Pezzano supra*.

### Subdivision (d)

Adopted from Fed. R. Crim. P. 6(e), this subdivision incorporates the substance of former G.L. c. 277, §§ 12-13. Nothing in this rule nor in the General Laws prevents a witness before a grand jury from disclosing his or her testimony. See *Commonwealth v. Schnackenburg*, 356 Mass. 65 (1969); *Silverio v. Mun. Court of Boston*, 355 Mass. 623, cert. denied, 396 U.S. 878 (1969). The last phrase, “except in accordance with law” is intended to comprehend statute, court rule, rule or order of an administrative agency, and case law.

### Subdivision (e)

In order to return an indictment, the grand jury “must hear sufficient evidence to establish the identity of the accused...and probable cause to arrest him” (citations omitted).

*Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982).

Although an indictment may be based solely on hearsay, *Commonwealth v. O’Dell*, 392 Mass. 445, 450-51 (1984), the Supreme Judicial Court has expressed a “preference for the use of direct testimony,” *Commonwealth v. St. Pierre*, 377 Mass. 650, 656 (1979). A prosecutor need not present the grand jury all the evidence available to the Commonwealth, even if some of it is exculpatory. See *O’Dell*, 392 Mass. at 447. However, if there is exculpatory evidence that would greatly undermine either the credibility of an important witness or likely affect the grand jury’s decision, the prosecutor should inform the grand jury. *Id.*

Although there is no statute which mandates the concurrence of at least twelve jurors in the return of an indictment, the requirement expressed in this subdivision is long-established in Massachusetts practice. See *Commonwealth v. Smith*, 9 Mass. 107 (1812). Grand jurors voting to return an indictment need not hear all of the evidence presented against a defendant. See *Commonwealth v. Wilcox*, 437 Mass. 33 (2002).

### Subdivision (f)

General Laws c. 277, § 15, requiring daily reports of cases where no indictment is returned, is the basis of this subdivision.

## Subdivision (g)

Prior Massachusetts procedure permitted the prosecutor to be present, See *Commonwealth v. Favulli*, supra at 107. A major change is worked by this subdivision, pursuant to which the prosecuting officer may be present during deliberations and voting only if his or her presence is requested by the grand jurors. It is believed that this will operate to enhance the independence of the grand jury, thus allaying fears that it is merely “a tool of the prosecutor”.

## Subdivision (h)

This subdivision essentially restates those provisions of G.L. c 277, §§ 1, 2, and 2A-2H relative to the duration of sittings of grand juries and of § 1A relative to extensions. Grand juries in Suffolk (§ 2), Middlesex (§ 2B), Worcester (§ 2E), Norfolk (§ 2F) and Bristol (§ 2H) counties are to serve for six months and in Hampden (§ 2C), Essex (§ 2G) and Plymouth counties (§ 2D) for four months “and until another grand jury has been impanelled in their stead.” Notwithstanding these express statutory provisions, the summoning of the grand jury and the duration of its term is subject to the discretion of the Administrative Justice of the Superior Court pursuant to subdivision (a).

# Rule 6: Summons to Appear; Arrest Warrant

(Applicable to District Court and Superior Court)

## (a) Issuance of Process

### *(1) Summons*

A defendant not under arrest or otherwise in custody shall, except as provided in subdivision (a)(2) of this rule, be notified of the criminal proceedings against him and of the date of the return day by means of a summons. A copy of the complaint or indictment shall accompany the summons. If the accused is a juvenile, a summons and copy of the complaint or indictment shall also be served upon the parent or legal guardian of the juvenile or upon the person with whom the juvenile resides. Such notice shall also advise the defendant to report in person to the probation department before the return day.

## *(2) Warrant*

The District Court may authorize the issuance of a warrant in any case except where the accused is a juvenile less than twelve years of age. Upon the return of an indictment against a defendant, the Superior Court may authorize the issuance of a warrant. The decision to issue a warrant may be based upon the representation of a prosecutor made to the court that the defendant may not appear unless arrested. If a defendant fails to appear in response to a summons or for any reason is not amenable to service, the prosecutor may request that a warrant issue or may resummon the defendant.

## *(b) Form*

### *(1) Warrant*

An arrest warrant issued pursuant to this rule shall be signed by the official issuing it and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. The warrant shall recite the substance of the offense charged in the complaint or indictment. It shall command that the defendant be arrested and brought before the court.

### *(2) Summons*

A summons shall be in the same form as a warrant except that it shall summon the defendant to appear before the court at a stated time and place.

## *(c) Service or Execution; Return*

### *(1) By Whom*

A summons may be served in the manner provided by subdivision (c)(3) of this rule by any person authorized by the General Laws to serve criminal process. A warrant shall be directed to and executed by an officer authorized by the General Laws to serve criminal process.

### *(2) Territorial Limits*

A summons may be served or a warrant executed at any place within the Commonwealth.

### *(3) Manner*

A summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing it to the defendant's last known address.



A warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant that a warrant has issued and of the offense charged, but if the officer does not then know of the offense charged, he shall inform the defendant thereof within a reasonable time after arrest.

#### *(4) Return*

On or before the return day, the person to whom a summons was delivered for service shall make return thereof to the issuing court. The clerk shall maintain a list of those summonses returned unserved which shall include a statement of the efforts made by the person to whom the summonses were delivered for service to serve them. If a summons is mailed pursuant to subdivision (c)(3) of this rule and returned, the clerk shall record that fact upon the list. The officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecutor any unexecuted warrant shall be returned to the issuing court and may be cancelled by that court upon its own motion or upon the motion of the prosecutor. At the request of the prosecutor made at any time while a complaint or an indictment is pending, a summons returned unserved or a warrant returned unexecuted and not cancelled may be delivered to an authorized person for service or execution.

### *(d) Default*

#### *(1) Costs*

A judge may order that expenses incurred as a result of the entry of a default against a defendant are to be assessed as costs against the defendant.

#### *(2) Preservation of Testimony*

If counsel for a defendant is present upon the entry of a default against the defendant and if the judge finds that to require the attendance at a later time of a witness then present in court would constitute a hardship upon the witness because of age, infirmity, illness, profession or other sufficient reason, the judge may order that the testimony of the witness be taken and preserved for subsequent use at trial or any other proceeding. The witness shall be examined in open court by the party on whose behalf he is present and the adverse party shall have the right of cross-examination. The expense of taking and preserving the testimony may be assessed as costs against the defendant.

# Rule History

*Effective July 1, 1979.*

## Reporter's Notes

Rule 6 was drafted with the aim of dispensing with unnecessary appearances by defendants, their counsel, and witnesses and insuring that defendants who are unlikely to flee pending their initial appearance may be at liberty without restriction.

### *Subdivision (a)*

Under prior practice, after a finding of probable cause—whether upon an application for issuance of process or upon presentment to a grand jury—arrest warrants were to be issued in the majority of cases. G.L. c. 276, § 22. The issuance of a summons in lieu of a warrant was the exception under the law, if not in practice.

Under G.L. c. 276, § 24, a summons was to be issued only in those instances where the District Court had final jurisdiction over the offense charged and the court believed a summons would sufficiently guarantee the defendant's appearance in court.

Under this rule the permissible use of a summons is greatly expanded. Whenever it is determined that process shall issue upon an application, the District Court shall authorize the issuance of a warrant, except in cases where the accused is a juvenile less than twelve years of age. G.L. c. 119, § 54. Whenever a direct indictment is returned against a defendant, the Superior Court shall authorize the issuance of a warrant. In both instances, however, the warrant will not be immediately issued for execution unless the court determines that the defendant will not likely appear upon a summons alone.

This rule reflects the policy underlying current efforts to secure the release prior to trial of all defendants who have sufficient roots in the community to guarantee their presence at trial. Federal Rule of Criminal Procedure 4 requires a magistrate to issue a summons rather than an arrest warrant only “upon the request of the attorney for the government” after probable cause is found. Section 3.3 of the ABA Standards Relating to Pretrial Release (Approved Draft, 1968) provides for the use of a summons instead of a warrant except where specific grounds exist for the use of an arrest warrant. Accord Rules of Criminal Procedure (U.L.A.) rule 221(c) (1974); National Advisory Commission on Criminal Justice Standards & Goals, Courts, standard 4.2 (1973). See Vermont R.Crim.P. 4 (1974).

The preference for the issuance of summonses operates to conserve law enforcement resources by releasing the police for other duties, and conserves the resources of the court and parties.

The preference for the issuance of a summons instead of a warrant is based on the same policy mandating the release of arrested defendants on personal recognizance rather than on bail. That policy is bottomed on the belief that defendants should be burdened with the fewest restrictions on their pretrial liberty that will adequately assure their presence at trial.

There is, however, one significant difference between the decision made concerning the issuance of a summons and that concerning the appropriate conditions of release after arrest. When a decision on bail is made, the court or magistrate has more information concerning the defendant than when a summons or warrant is to be issued. In the former instance, the defendant is present before the court and can be questioned in order to establish a sufficient basis for a determination of the appropriate conditions of his release. In addition, under Mass. R. Crim. P. 28, the judge is authorized to review the probation report concerning the defendant prior to the bail determination.

In light of these considerations, it is intended that the court not be prohibited from issuing an arrest warrant where there is an absence of sufficient information to make an intelligent choice concerning the appropriate process to be issued. Where there is a dearth of information concerning the defendant, it is expected that the court will place much reliance upon the nature of the offense charged and will order the arrest of defendants charged with serious crimes. An arrest in such situations will not unduly prejudice a defendant, because, if he is suitable for pretrial release on his own recognizance, the court can so order when the defendant is initially brought before it after arrest.

Subdivision (a)(1) provides that, except when the issuance of a warrant is necessitated, the defendant is to be notified of the criminal proceedings against him and the date of his scheduled appearance by means of a summons coupled with a copy of the complaint or indictment. See Rules of Criminal Procedure (U.L.A.) rule 222(d) (1974). This notice shall also advise the defendant to personally report to the probation department before his scheduled appearance for the purpose of an interview to determine whether counsel need be assigned. If the defendant has retained counsel, and counsel has filed his appearance, the defendant need not attend until his next scheduled appearance.

Subdivision (a)(1) also deals with the requirement of G.L. c. 119, § 55 that notice to the parent or guardian of the defendant is necessary when the accused is a juvenile. Although notice to and appearance by a parent or guardian is thus required, nothing in this rule is to

be construed as making the parent or guardian of the juvenile a party defendant. *Robinson v. Commonwealth*, 242 Mass. 401, 403 (1922).

Subdivision (a)(2) provides that upon the prosecuting officer's recital to the court that the defendant will not appear unless arrested, a warrant may be issued. This is less restrictive than the guidelines provided by the ABA Standards Relating to Pretrial Release, § 3.3 (Approved Draft, 1968), which require an application for an arrest warrant to reveal the defendant's residence, employment, family ties, criminal record, and whether he had previously responded to a citation or summons. If a magistrate fails to issue a summons instead of an arrest warrant, he is required to state the reason therefor. Compare Rule 221(c) of the Uniform Rules of Criminal Procedure (U.L.A.) (1974).

The factors to be considered by the court in its decision upon the conditions necessary to assure the defendant's presence are reflected in the Rules of the Superior Court Governing Persons Authorized to Take Bail 2 (1972):

*The purpose of setting terms for any pretrial release is to assure the presence at court of the person released. Any person charged with an offense, other than an offense punishable by death [sic], is required by law to be released on his personal recognizance pending trial unless the person setting the terms of release determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. In making a determination as to what form of release to set, the following factors shall be considered: (1) the nature and circumstances of the offense charged, (2) the accused's family ties, (3) his financial resources, (4) his length of residence in the community, (5) his character and mental condition, (6) his record of convictions and appearances at court proceedings or of any previous flight to avoid prosecution or (7) any failure to appear at any court proceedings.*

Accord G.L. c. 276, § 58 (as amended, St. 1978, c. 478, § 286).

Moreover, this subdivision provides that if a defendant fails to respond to summons, then the court may order that a warrant issue, or may permit the defendant to be served with a new summons. This accords with practice under G.L. c. 276, § 26, which makes the willful failure to appear in response to criminal process a separate offense. See ABA Standards Relating to Pretrial Release § 1.3 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 221(e)(2) (1974).

## *Subdivision (b)*

General Laws c. 276, § 21, c. 218, § 33 (as amended, St. 1978, c. 478, § 191), and c. 218, § 35 (as amended, St. 1978, c. 478, § 192) enumerate those officials who are empowered to issue arrest warrants.

Subdivision (b)(1) restates the Massachusetts practice, dating from *Commonwealth v. Crathy*, 92 Mass. (10 Allen) 403 (1865), which requires that if the warrant does not contain a name by which the accused is known, it must contain a sufficient description by which the arresting officer will be able to identify the accused with reasonable certainty. This subdivision follows the practice in Massachusetts which mandates that the warrant shall recite the substance of the accusation, G.L. c. 276, § 22, a requirement fulfilled at common law by attaching the complaint or a copy thereof to the warrant. *Commonwealth v. Dean*, 75 Mass. (9 Gray) 283 (1857). General Laws c. 276, § 22 details the procedure to be followed by the arresting officer when the accused is located.

Support for the rule that the warrant must be directed to an officer authorized to serve criminal process is found in *In re Graves*, 236 Mass. 493 (1920). In *Graves*, the court held that a warrant which by express direction would have permitted unqualified persons to execute it was invalid on its face.

## *[Subdivision (c)]*

Subdivision (c)(3) is also borrowed from ALI Model Code of Pre-Arrest Procedure § 120.3(2) (P.O.D. 1975), and is similar to Rules of Criminal Procedure (U.L.A.) rule 223(c) (1974). The ALI Model Code, *supra*, § 120.4, permits service of the summons by mail.

It is well established in Massachusetts that an officer need not have the warrant authorizing the arrest in his possession when the accused is placed under arrest. This principle is grounded on the judicial determination that an arrest is valid if based on probable cause even if the warrant upon which the arrest was made is void. *Commonwealth v. Bowlen*, 351 Mass. 655 (1967). However, if the arrest is based upon a warrant, the accused should be afforded an opportunity to examine it within a reasonable time.

Subdivision (c)(4) complies substantially with Rule 225 of the Rules of Criminal Procedure (U.L.A.) (P.O.D. 1975) and with Fed. R. Crim. P. 4(c)(4).

General Laws c. 218, § 32 states that warrants are returnable before a court in the county where trial of the case is to be held. The only restrictions on the time in which a warrant must be executed is that a delay in its execution must not be unreasonable. See generally *Commonwealth v. Sullivan*, 354 Mass. 598 (1968). However, if execution of the warrant is

wilfully delayed by the person to whom it was committed for service, that person is subject to the penalties provided by G.L. c. 268, § 22-23 irrespective of whether the warrant is valid.

### *Subdivision (d)*

This subdivision introduces two new practices. The first, in subdivision (1), allows the court to assess as costs against the defendant those expenses which result from the defendant's failure to appear. While the assessment is discretionary, it is intended to be exercised only upon the willful default of a defendant and as to those costs which directly result therefrom. As under Mass. R. Crim. P. 10(b), relating to assessment of costs upon a continuance, expenses which may be assessed under this rule include fees of witnesses then present, extra compensation of police officers, travel costs, and stenographer's attendance fees if one is appointed.

Subdivision (2) provides that if a witness is present in court and the trial cannot proceed because the defendant is absent, the testimony of that witness may be ordered taken and recorded by deposition. This is an extraordinary practice, and is to be utilized only when to require the later appearance of the witness would constitute a hardship due to his age, infirmity, profession or other sufficient reason. "Profession" in this context does not signify solely the recognized professions, but refers to the manner of earning a livelihood of one who will lose income or wages if required to attend further proceedings.

There is no issue as to confrontation in this situation. A defendant has the right to be present at the taking of a deposition, see Mass. R. Crim. P. 18(a), but "his failure to appear after notice and without cause shall constitute a waiver of the right to be present." Mass. R. Crim. P. 35(c). This subdivision is but a logical extension of that provision. The defendant has had notice to appear for trial and has chosen to absent himself. It is assumed for purposes of this rule that defendant's counsel is present to examine or cross-examine the deponent and to preserve objections to his testimony. Thus the essential need of the defendant to be present is fulfilled.

The defendant is protected from a "default" by the Commonwealth by Mass. R. Crim. P. 10(c), pursuant to which the court may order that the taking of depositions of Commonwealth witnesses be made a condition upon the grant of a continuance.

## **Rule 7: Initial Appearance and Arraignment**

(Applicable to cases initiated on or after September 7, 2004)

## (a) Time of Arraignment; Probation Interview; Indigency and Bail Reports

### *(1) Upon Arrest or Summons*

A defendant who has been arrested and is not released shall be brought for arraignment before a court if then in session; and if not, at its next session. A defendant who receives a summons or who has been arrested but is thereupon released shall be ordered to appear before the court for arraignment on a date certain.

### *(2) Arrest of a Juvenile*

Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office.

### *(3) Probation Interview*

On the day of the arraignment, the probation department shall interview the defendant; the probation department shall report to the court the pertinent information reasonably necessary to determine the issues of bail and indigency.

## (b) Arraignment Procedure

### *(1) Notice; Plea; and Bail*

The court shall:

- (A) read the charges to the defendant in open court, except that the reading of the charges in open court may be waived by the defendant if he or she is represented by counsel;
- (B) enter the defendant's plea to the charges;
- (C) inform the defendant of all warnings and advisories required by law; and,
- (D) determine the conditions of the defendant's release, if any.

### *(2) Appointment of Counsel*

If the court finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant.

### *(3) Provision of Criminal Record; Preservation of Evidence*

The court shall ensure that at or before arraignment, (i) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (ii) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

### *(4) Order Scheduling Pretrial Proceedings*

At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

## **(c) Appearance of Counsel**

### *(1) Filing*

An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the arraignment. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, Board of Bar Overseers number, address, and telephone number of the attorney. An attorney appearing on behalf of an organization shall also file with the court proof of the attorney's authorization to represent the organization.

### *(2) Effect; Withdrawal*

An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that, if at the arraignment such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the arraignment wishes to withdraw the appearance, he or she may do so within fourteen days of the arraignment, provided that the attorney who shall represent the defendant at



trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

### *(3) Notice*

A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

## Rule History

*Amended May 29, 1986, effective July 1, 1986; amended March 8, 2004, effective September 7, 2004; amended February 27, 2012, effective June 1, 2012.*

## Reporter's Notes

### *(2012)*

In 2012, Rule 7 was amended in several respects. These revisions are discussed below.

### Subdivision (a)(1)

Defendants who are released on bail prior to the issuance of a complaint or those who receive a summons must be ordered to appear in court for their arraignment on a date certain. Courts may establish their own policy on whether that date falls on the same day of every week or within a particular time frame. The 2012 amendments eliminated the separate event of an initial appearance prior to arraignment. The widespread availability of counsel to represent defendants at arraignment made this separate event unnecessary. The 2012 amendments also eliminated the procedure that allowed a summonsed defendant who had retained counsel to be excused from appearing until the pretrial conference or trial.

### Subdivision (b)(1)

By referring to "the court" as the responsible agency for conducting all of the activities surrounding the arraignment, this subdivision is meant to include judges, special magistrates, and any Superior Court clerk-magistrates authorized to conduct arraignments.

### **Subdivision (b)(1)(A)**

This provision requires that the arraignment take place in open court. It restates accepted practice, reflected in the mandate of *Foley v. Commonwealth*, 429 Mass. 496, 498 (1999). The concept of an open court means that the public must be allowed access absent "an

overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Boston Herald v. Superior Court*, 421 Mass. 502, 505 (1995), quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

Arraignments may take place outside of a courtroom, in settings such as correctional facilities, see *Foley*, supra, or hospitals, see *Boston Herald*, supra, so long as the public's right of access to the proceedings is as free as in a courthouse, subject to the same considerations that might lead a judge to close a courtroom to the public.

### ***Subdivision (b)(1)(C)***

This provision is intended to alert all the participants at the arraignment of the provisions for notice that appear outside the Rules of Criminal Procedure, such as the bail warning mandated by G. L. c. 276, § 58, and the requirement of G. L. c. 111E, § 10; that defendants charged with drug offenses have a right to request an examination concerning drug dependency.

### ***Subdivision (c)(1)***

When an attorney in a criminal case appears for an organization, whether incorporated or not, he or she must present the court with proof of authority to act on behalf of the defendant. The proof of authority that this subdivision requires can come in the form of a resolution by a board of directors in the case of a corporate defendant or a similar statement from the person or group authorized to make litigation decisions on behalf of an unincorporated organization. SJC Rule 1:21 already requires corporate defendants in criminal cases to file a disclosure form revealing the identity of any parent corporation or any publicly listed company that owns 10% or more of its shares.

### ***Revised (2004)***

Rule 7 governs the initial appearance and arraignment. It is based in part upon Fed. R. Crim. P. 5, 5.1, and 10. See ALI Model Code of Pre-Arraignment Procedure § 310.1, .3, .5 (POD 1975); Rules of Criminal Procedure (ULA) rules 311-13, 321 (1974). In 2004, Rule 7 was amended in four respects. The revisions mandate: that in some circumstances counsel be permitted to enter a limited appearance; that the defendant receive a copy of his or her criminal record at arraignment; that the parties have an opportunity to move to preserve evidence at arraignment; and that pretrial conference and hearing dates, or alternatively a probable cause hearing date, be assigned at the initial appearance. These revisions are addressed in detail infra.

## Subdivision (a)(1)

Subdivision (a) provides that when a defendant has been arrested, he or she is to be brought immediately to appear before a court if then in session, and if not, then at its next session.

Pursuant to G.L. c 119, § 67, notice of the arrest of a juvenile is required to be given to the parent of the juvenile and to the probation officer for the district in which the accused is arrested, unless the juvenile was arrested as a child in need of service pursuant to G.L. 119, § 39H, which contains alternative notification requirements. The purpose of this notice is to permit the prompt release of a juvenile, consistent with G.L. c 119, § 66, which discourages the detention of juvenile offenders, unless, in the opinion of the arresting officer or the probation department, cause exists to hold him or her.

Massachusetts case law requires that an arrested defendant be brought before a court for arraignment as soon after arrest as is reasonably possible. *Commonwealth v. Dubois*, 353 Mass. 223 (1967); *Keefe v. Hart*, 213 Mass. 476 (1913). Whether or not delay has been unreasonable is to be determined on a case-by-case basis, *Commonwealth v. Banuchi*, 335 Mass. 649 (1957), and in light of all the circumstances. *Commonwealth v. Perito*, 417 Mass. 674, 680 (1994); *Commonwealth v. Hodgkins*, 401 Mass. 871, 876-77 (1988). Generally, arraignment the next morning following arrest is not unreasonable when a defendant is arrested late in the day. *United States v. Connell*, 213 F. Supp. 741 (D. Mass. 1963); *Commonwealth v. Daniels*, 366 Mass. 601 (1975); *Commonwealth v. Dubois*, *supra*. Rule 7(a) codifies this case law by mandating that the defendant be brought before the court immediately if the court is in session, and if not, then at its next session. This requirement is primarily intended to prevent both unlawful detentions and unlawfully obtained statements. *Commonwealth v. Cote*, 386 Mass. 354, 361 n. 11 (1982). However, in *Commonwealth v. Rosario*, 422 Mass. 48 (1996), the S.J.C. established a bright line rule that an otherwise admissible statement taken within a six-hour period following arrest should not be excluded, even if the court was in session at the time.

This initial appearance before the court serves several functions. First, at this time, the defendant will be interviewed by the probation department. The results of this interview, together with an investigative report by the probation department as to prior criminal prosecutions and juvenile complaints, will be communicated to the court. See Mass. R. Crim. P. 28(d)(1)-(2). This information will form the basis of decisions as to pretrial release. Moreover, this information will be used to determine whether a defendant is indigent or indigent but able to contribute. If the court so determines, then it will assign the Committee for Public Counsel Services to represent him according to the requirements of G.L. c. 211D and Supreme Judicial Court Rule 3:10. If the defendant was arrested without a warrant,

there must also be a judicial determination of probable cause within twenty-four hours, as provided in Rule 3.1. See *Jenkins v. Chief Justice of the District Court Dep't*, 416 Mass. 221 (1993). Finally, at this time the court shall establish a time for arraignment or other proceeding.

The initial appearance and arraignment, although distinguishable by their respective functions, need not be separate events. The preferred practice, however, is to postpone arraignment until such time as the defendant has had a meaningful opportunity to consult with counsel. See District Court Initial Rule of Criminal Procedure 2, comment (1971).

The vital importance of the component parts of arraignment must not be lost in the tedium of repetition so as to foreclose inadvertently the rights of the uninformed defendant. Among the decisions to be made is whether to plead guilty or nolo contendere, or to admit to sufficient facts. Mass. R. Crim. P. 12. Representation by counsel is necessary to ensure that the defendant understands that by selecting among these alternatives he or she is exercising or waiving substantial rights. Counsel should also be available to advise the defendant whether to exercise “drug rights,” G.L. c. 111E, § 10; whether to undergo examination for competence, G.L. c. 123, § 15; whether he or she may qualify for diversion as a selected offender, G.L. c. 276A; whether arrangements should be made for a stenographer, G.L. c. 221, § 91B; whether to consider mediation in cases where it is offered; and whether the charges may be subject to dismissal. In addition, at arraignment the defendant may waive reading of the charges, subdivision (c), *infra*; and the case will be ordered to conference, Mass. R. Crim. P. 11. These considerations are all important to the ultimate rights of the defendant and decisions should not be casual or perfunctory. Therefore, if counsel is to be provided, there should be a prompt assignment or appointment, and time should be allowed for consultation. The initial appearance and arraignment can be held on the same day if assigned or appointed counsel is then present in court or is available without delay, and if there is an opportunity for adequate consultation.

The fact that a defendant is to be afforded time to discuss the case with counsel is not to be relied upon by the prosecution to justify undue delay in bringing the defendant before the court for arraignment.

## Subdivision (a)(2)

If a defendant is issued a summons instead of being arrested, a procedure different from that under subdivision (a)(1) prevails. In such an instance a defendant who has retained counsel need not be present at the scheduled initial appearance if his or her counsel enters an appearance prior thereto. This is required in order that the prosecution and any

witnesses of the parties may be notified not to attend. When counsel enters an appearance, the clerk will set the time for the next scheduled event which will require the defendant's presence—usually the pretrial conference or pretrial hearing—and counsel will notify the defendant thereof.

Subdivision (a)(2) does not require the defendant's presence on the date specified on the summons (unless that is the date established by the clerk when counsel enters his or her appearance) because the purposes for the initial appearance outlined in subdivision (a)(1) have been fulfilled. See Rules of Criminal Procedure (ULA), *supra*, rule 312.

The purpose of this subdivision is to conserve judicial resources and those of the defendant by dispensing with unnecessary appearances. Further, the pretrial liberty of defendants who are likely to appear for arraignment is not compromised.

The defendant who cannot afford or who does not have retained counsel must attend at the initial appearance at the time set in the summons. Prior to that time, the defendant must have appeared at the probation department so that information relative to the issues of bail and indigency may be gathered.

If a defendant intends to waive counsel, the waiver should be executed at the initial appearance.

## Subdivision (b)

This subdivision governs the entry and withdrawal of appearances by counsel. It combines and revises former subdivisions (b) and (c), which had treated District Court and Superior Court appearances differently. Following the abolition of the district court *de novo* system, a 2004 amendment to this Rule instituted a uniform procedure for both trial courts. It also revised the rule to permit limited appearances in some circumstances—a more efficient option when fully competent counsel is present but unable to submit an appearance guaranteeing representation throughout the case. Assistant district attorneys often do not represent the Commonwealth in a case from beginning to end, and sometimes a public defender or bar advocate is on duty for bail and arraignment sessions only. The original formulation of this subdivision deflected progress in the case by generally barring the appearance of counsel for such limited purposes.

As amended, subdivision (b) provides that the entry of an appearance by defense counsel presumes that he or she will represent the defendant at the tender of a plea or at trial, but permits the court to order an appearance for a shorter period when no contrary constitutional, legislative or judicial restriction applies. For example, District Court Dept. Supplemental Rule of Criminal Procedure 8(8) authorizes the appointment of an attorney “for arraignment only,” but prohibits any other kind of limited appointment. Rule 7(b) as

amended is not intended to preempt such court rules, but to provide the flexibility necessary for courts to formulate and revise such rules over time. An appearance entered by defense counsel may only be withdrawn as of right within fourteen days after arraignment and provided substitute counsel has simultaneously entered an appearance.

A second revision introduces a responsible degree of flexibility with regard to appearances by the prosecution. An appearance entered by a prosecutor constitutes a representation that he or she will prosecute a case at trial and may only be withdrawn with permission of the court. However, if such a representation cannot be made, subdivision (b)(2) allows an appearance to be entered in the name of the prosecuting agency, but this requires the office (a) to ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and (b) upon request of the court or other counsel, to identify the prosecutor then assigned to the case. These requirements were added to the rule in 2004 to ameliorate a difficulty in then-existing district court practice: defense counsel was too often unable to speak with a district attorney about the case between arraignment and the next scheduled date because no assistant district attorney had yet been assigned to it. This revised procedure will facilitate early discussions between the parties, and also insure that notices delivered to the offices of the Attorney General or a District Attorney will be brought to the immediate attention of the assistant handling the case.

## Subdivision (c)

The major functions of the arraignment are to inform the defendant of the charge and to receive his or her plea thereto. Subdivision (c)(1) permits the defendant to waive the reading of the charges if represented by counsel. This is a restatement of District Court Initial Rule of Criminal Procedure 1 (1971); accord, Rules of the Municipal Court of the City of Boston Sitting for Criminal Business 1 (1971).

If the defendant's attendance at the initial appearance is excused, subdivision (c)(2) provides for the automatic entry of a plea of not guilty. Implicit in (c)(2) is a waiver of the reading of the charge. There is then no arraignment as defined in this Rule and the next event is usually the pretrial conference.

## Subdivision (d)

This subdivision mandates two additional procedures at arraignment. First it requires that the defendant be provided with his or her criminal record at arraignment. This was customarily the case long before the promulgation of this subdivision in 2004, and in district court was already mandated by Dist./ Mun. Cts. R. Crim. P. 3. (That Rule goes beyond this subdivision, however, by also requiring the prosecution to provide certain police statements to the defendant at a district court arraignment.) Second, subdivision (d)

provides an opportunity at arraignment for the parties to seek an order to preserve evidence that is not subject to a Rule 14 discovery order. Rule 14 discovery reaches only items in the possession, custody or control of the prosecution, its team, or those working with it on the case. But private parties or government agencies not working on the case may have relevant evidence that could be destroyed absent court action. Such evidence should not be subject to an individual's unfettered decision to destroy it in cases where counsel for a party considers preservation important. Therefore, under Rule 14(a)(1)(E), the parties may move for an order preserving this evidence. Subdivision (d) of Rule 7 simply guarantees the parties an opportunity to be heard on this motion at the initial appearance, since expedition may be crucial in such cases.

When a preservation order is requested at arraignment, the nonparty custodian of the evidence is not likely to be present to assert its interests. However, the non-party may subsequently contest the order, or request the court to use its authority under subdivision 14(a)(1)(E)(ii) to “modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.”

### Subdivision (e)

This subdivision, promulgated in 2004, requires the District Court to issue an order at the initial appearance scheduling subsequent pretrial proceedings. For this purpose the subdivision distinguishes between a “probable cause track” and a “pretrial conference/pretrial hearing” track. The latter requires the court to schedule both a pretrial conference (between the attorneys) and a pretrial hearing, each further addressed in Rule 11. As to the former, some District Court arraignments are continued for probable cause hearings rather than pretrial conferences. Under the statutory mandate that probable cause hearings be held “as soon as may be”, G.L. c 276 § 38, the Court should not assign any intervening pretrial conferences or hearings when it intends to, or by statute must, bind over the case. The subdivision's recognition of a separate “probable cause track” is necessary to effectuate this statutory requirement. However, nothing in Rule 7(e) prevents the court from subsequently continuing the probable cause hearing to another date, or (in concurrent jurisdiction cases) from ordering a short continuance of the initial hearing to permit counsel to prepare arguments on whether district court jurisdiction should be declined.

## Rule 8: Assignment of Counsel

(Applicable to District Court and Superior Court)

If a defendant charged with a crime for which a sentence of imprisonment or commitment to the custody of the Department of Youth Services may be imposed initially appears in any court without counsel, the judge shall follow the procedures established in G. L. c. 211D and in Supreme Judicial Court Rule 3:10.

## Rule History

*Amended May 29, 1986, effective July 1, 1986.*

## Reporter's Notes

This rule is in large part derived from former Supreme Judicial Court Rule 3:10 (1967: 351 Mass. 791, as amended, 1969: 355 Mass. 803), and District Court Initial Rules of Criminal Procedure 2, 10 (1971). See Fed.R.Crim.P. 44.

### *Subdivision (a)*

The present state of the law is that counsel is required in all cases where the defendant faces possible imprisonment unless the defendant properly waives his right to the assistance of counsel. *Argersinger v. Hamlin*, 92 S.Ct. 2006, 407 U.S. 25, 32 L.Ed.2d 530 (1972).

The Supreme Court has held the right to assistance of counsel fundamental in certain juvenile proceedings as well:

*A proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.*

In *re Gault*, 87 S.Ct. 1428, 387 U.S. 1, 36, 18 L.Ed.2d 527 (1967). There the Court concluded that in delinquency proceedings where the juvenile faces a risk of commitment, the juvenile and his parent must be notified of the juvenile's right to counsel and that counsel will be assigned by the court if the juvenile is indigent. In *re Gault*, *supra*, at 41; *Marsden v. Commonwealth*, 352 Mass. 564, 567, 227 N.E.2d 1 (1967); District Court Special Rule 207 (1974).

The stages of criminal proceedings at which the right to counsel has been held to apply include arraignment (*Hamilton v. Alabama*, 82 S.Ct. 157, 368 U.S. 52, 7 L.Ed.2d 114 [1961]; see *Commonwealth v. White*, 362 Mass. 193, 285 N.E.2d 110 [1972]), probable cause



hearing (*White v. Maryland*, 83 S.Ct. 1050, 373 U.S. 59, 10 L.Ed.2d 193 [1963]; see *Arsenault v. Massachusetts*, 89 S.Ct. 35, 393 U.S. 5, 21 L.Ed.2d 5 [1968] ), when the plea is tendered (*Moore v. Michigan*, 77 S.Ct. 150, 352 U.S. 907 [1956] ), trial (*Gideon v. Wainwright*, 83 S.Ct. 792, 372 U.S. 335, 9 L.Ed.2d 799 [1963] ), sentencing (*Townsend v. Burke*, 71 S.Ct. 286, 334 U.S. 736, 95 L.Ed. 661 [1948] ), appellate proceedings (*Douglas v. California*, 83 S.Ct. 814, 372 U.S. 353, 9 L.Ed.2d 811 [1963]; see *Arsenault v. Massachusetts*, *supra*; compare *Ross v. Moffitt*, 94 S.Ct. 2437, 417 U.S. 600, 41 L.Ed.2d 341 [1975] ), probation revocation proceedings (*Williams v. Commonwealth*, 350 Mass. 732, 216 N.E.2d 779 [1966] ), lineups after the defendant has been formally charged (*Kirby v. Illinois*, 92 S.Ct. 1877, 406 U.S. 682, 32 L.Ed.2d 411 [1972]; *Commonwealth v. Mendes*, 361 Mass. 507, 281 N.E.2d 243 [1972] and cases cited), and transfer hearings to determine whether a juvenile is to be tried as an adult offender (*Kent v. United States*, 86 S.Ct. 1045, 383 U.S. 541, 561, 16 L.Ed.2d 84 [1966]; see *Marsden v. Commonwealth*, 352 Mass. 564, 567 n. 5, 227 N.E.2d 1 [1967] ).

Counsel is also to be available to a defendant at the taking of a deposition pursuant to Mass.R.Crim.P. 32 (see 18 U.S.C. § 3503[c] [1970] from which Rule 32 derived) and during plea discussions under Mass.R.Crim.P. 12(b)(1).

In requiring that a defendant be advised of his right to, and provided with, counsel upon any appearance in court, Rule 8 is in accord with ABA Standards Relating to Providing Defense Services § 5.1 (Approved Draft, 1968), which directs that counsel should be provided “as soon as feasible.”

General Laws c. 221, § 34D states in part that the Massachusetts Defenders Committee

*shall provide counsel at any stage of a criminal proceeding, other than capital, ... provided ... that [the] defendant is unable to obtain counsel by reason of his inability to pay.*

Consistent with § 34D, for purposes of this rule, inability to obtain counsel is intended to include only financial inability. There are, however, no criteria supplied by statute or court rule to govern the judicial determination of who qualifies for assigned counsel, despite the fact that G.L. c. 261, § 27C(2), applicable to criminal cases, requires the clerk to “conspicuously post in that part of his office open to the public a notice specifying the indigency limits currently in force...”

In answering the question of whether, under G.L. c. 221, § 34D, the defendant is “unable to obtain counsel by reason of his inability to pay,” the judge may choose to rely on the opinion of the probation department, which is required to be prepared by G.L. c. 221, § 34D. However, since the final decision on indigency is the responsibility of the judge, neither the

probation department's opinion nor its report of relevant information can be considered conclusive. The judge or special magistrate must “interrogate the defendant to satisfy himself that the defendant is unable to procure counsel.” District Court Initial Rule of Criminal Procedure 2 (1971) requires that the interrogation be conducted in open court, but its dimensions are left to the judge's discretion.

General Laws c. 119, § 29A states that the parent of an unemancipated minor is liable for the minor's legal expenses, not to exceed three hundred dollars. While the resources of the parents may be included in the determination of the juvenile's indigency, if the parents refuse to retain counsel, the juvenile is entitled to court-provided counsel. It is the practice in some courts of the Commonwealth to impose costs for legal expenses of a juvenile upon the parents, notwithstanding the three-hundred-dollar limit of § 29A, *supra*, on the grounds that services of counsel are a necessity for which the parents are liable.

The assignment of counsel for, or the election to proceed without counsel by, a juvenile is governed by these rules.

### *Subdivision (b)*

This subdivision is drawn from and restates the substance of former S.J.C. Rule 3:10, paragraph 2 (1967: 351 Mass. 791, as amended, 1969: 355 Mass. 803). It is thus intended that counsel shall be assigned from the Massachusetts Defenders Committee, G.L. c. 221, § 34D, or from “a voluntary charitable group, corporation, or association,” unless exceptional circumstances such as a conflict of interests or a need for foreign language speaking counsel justify appointing private counsel. See Superior Court Rule 53(3) (1974). *Commonwealth v. Sheeran*, 370 Mass. 82, 345 N.E.2d 362 (1976).

While the court in its discretion may appoint counsel other than from the Massachusetts Defenders Committee or similar organization, that discretion is to be exercised “sparingly” and not “unnecessarily.” *Abodeely v. County of Worcester*, 352 Mass. 719, 227 N.E.2d 486 (1967).

The statutes provide compensation for appointed counsel only in capital cases (G.L. c. 276, § 37A: “reasonable compensation”) and more particularly in murder cases (G.L. c. 277, § 55: “reasonable compensation” and § 56: “reasonable expenses”). Sections 55-56 provide that compensation is to be paid by the county where the indictment is found. The court in *Abodeely v. County of Worcester*, 352 Mass. 719, 227 N.E.2d 486 (1967), held that G.L. c. 213, § 8, which had been construed to compel the counties (now the Commonwealth: see G.L. c. 213, § 8, as amended, St. 1978, c. 478, § 127) to pay the expense of prosecuting non-capital criminal cases, should be extended to cover also the costs of appointed defense counsel in such cases.

*If we are to provide proper prosecution we must also provide appropriate defence under the Constitution.... [W]hen the court assigns counsel for the defence in cases of needy criminal defendants then counsel should be paid from the county treasury....*

352 Mass. at 723-24. General Laws c. 276, § 37A and c. 277, §§ 55-56, provide for “reasonable” compensation and expenses. Superior Court Rule 53 imposes a maximum limit on what will be allowed unless an excess is authorized in advance, Rule 53(2), (3)(c), or is deemed necessary in extraordinary circumstances, Rule 53(3)(d).

### *Subdivision (c)*

Provision for an assignment docket to be maintained by the clerk is drawn from former S.J.C. Rule 3:10, paragraph 3 (1967: 351 Mass. 791, as amended, 1969: 355 Mass. 803) and is consistent with prior law.

### *Subdivision (d)*

If a defendant is found to be financially able to retain counsel at his own expense it is, of course, incumbent upon him to do so. If a defendant is dilatory in engaging counsel, the court is empowered to take reasonable steps to keep the proceedings moving, even if the defendant's failure to arrange representation leaves him without counsel. *Commonwealth v. Jackson*, 376 Mass. 790, 383 N.E.2d 835 (1978). See *Ungar v. Sarafite*, 84 S.Ct. 841, 376 U.S. 575, 588-91, 11 L.Ed.2d 921 (1964); *United States v. White*, 529 F.2d 1390, 1394 (8th Cir.1976); *United States v. Sperling*, 506 F.2d 1323, 1337 n. 19 (2d Cir.1974), cert. denied, 95 S.Ct. 1351, 420 U.S. 962 (1975); *Glenn v. United States*, 303 F.2d 536, 542-43 (5th Cir.1962), cert. denied sub nom., *Belvin v. United States*, 83 S.Ct. 737, 372 U.S. 922, 9 L.Ed.2d 726 (1963). Compare *Commonwealth v. Cavanaugh*, 371 Mass. 46, 51, 353 N.E.2d 732 (1976) (myopic insistence upon expeditiousness in the face of a justifiable request for delay can render right to counsel an empty formality).

### *Subdivision (e)*

If the defendant wishes to waive counsel and proceed pro se, that right is guaranteed by the sixth and fourteenth amendments to the United States Constitution. *Faretta v. California*, 95 S.Ct. 2525, 422 U.S. 806, 45 L.Ed.2d 562 (1975). The right to self-representation is recognized in Massachusetts in Article 12 of the Declaration of Rights: “every subject shall have a right ... to be fully heard in his defense by himself or his counsel, at his election.” *Commonwealth v. Mott*, 2 Mass.App. 47, 51, 308 N.E.2d 557 (1974).

However, the “waiver of counsel will not be presumed from a silent record.” *Williams v. Commonwealth*, 350 Mass. 732, 734, 216 N.E.2d 779 (1966). Since the right to counsel is a

constitutional right, the court should insure that a defendant's waiver of that right is both voluntary and intelligent. See *Johnson v. Zerbst*, 58 S.Ct. 1019, 304 U.S. 458, 464, 82 L.Ed. 1461 (1938). Section 7.2 of the ABA Standards Relating to Providing Defense Services (Approved Draft, 1968) is instructive on this issue:

*The accused's failure to request counsel or his announced intention to plead guilty should not of itself be construed to constitute a waiver. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of that offer and his capacity to make the choice intelligently and understandingly has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or the complexity of the case, or other factors.*

The requirement of this rule that the waiver be in writing and signed by the defendant and certified by the judge or special magistrate is supportive of the notion that any waiver to be constitutional must be both voluntary and intelligent.

Both the United States Supreme Court and the Supreme Judicial Court of Massachusetts have made it clear that the right to proceed pro se is not unqualified. Under the *Faretta* decision, *supra*, although it is recognized that the right to proceed pro se is personal to the defendant and constitutionally guaranteed, nonetheless the trial judge must make an inquiry into whether the accused is choosing to proceed pro se in an intelligent and competent manner.

*Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation.*

*Faretta*, *supra*, at 835.

Massachusetts case law is in accord with this rule, and qualifies the waiver of counsel further. First, the request to proceed pro se must be unequivocal. Second, it should be asserted before trial. Finally, an inquiry as to the defendant's competence and intelligence in making the decision must be conducted and the motivation of the defendant examined. The defendant must also be told of the possible disadvantages of representing himself. *Commonwealth v. Cavanaugh*, 371 Mass. 46, 353 N.E.2d 732 (1976); *Commonwealth v. Mott*, *supra*. See *Commonwealth v. Jackson*, 376 Mass. 790, 383 N.E.2d 835 (1978).

The qualification that the waiver be unequivocal results in leaving a later request due to change of mind to the discretion of the trial judge—the defendant is no longer entitled to

counsel as of right. *Commonwealth v. Jackson*, 376 Mass. 790, 383 N.E.2d 835 (1978). See *Commonwealth v. Drolet*, 337 Mass. 396, 149 N.E.2d 616 (1958).

Moreover, the assertion of the right to proceed pro se should be made before trial. “Once the trial has begun with the defendant represented by counsel, ... his right thereafter to discharge his lawyer and to represent himself is sharply curtailed.” *Commonwealth v. Mott*, 2 Mass.App. 47, 308 N.E.2d 557. The courts on both the federal and state levels have construed the language “sharply curtailed” very strictly. In *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2d Cir.1965), it was held that after commencement of trial

*there must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.*

*Id. at 15.*

If a defendant is to proceed pro se, he must have waived counsel “knowingly and intelligently.” *Faretta*, supra, held that technical, legal knowledge is not the test, but rather whether the defendant is literate, competent, and understanding, and is voluntarily exercising his free will. Accord *Commonwealth v. Jackson*, 376 Mass. 790, 383 N.E.2d 835 (1978). Impliedly, if the court finds that the defendant fails this test after an inquiry, it may appoint counsel notwithstanding the defendant's motion to proceed pro se. See subdivision (f), *infra*.

In *Von Moltke v. Gillies*, 68 S.Ct. 316, 332 U.S. 708, 92 L.Ed. 309 (1948) the Supreme Court laid down a searching formula to be used by trial judges in making certain that a defendant understandingly waives his right to counsel. Massachusetts, however, has not strictly interpreted *Von Moltke*. A judge is not required

*literally to fulfill all elements of a formula describing his responsibilities for acceptance of waiver of counsel. Substance rather than form is the guiding criterion for reviewing courts.*

*Commonwealth v. Fillippini*, 2 Mass.App. 179, 182, 310 N.E.2d 147 (1974). Moreover, the *Faretta* decision, which recognizes emphatically the right to proceed pro se, would seem to erode the need for use of any rigid formula as long as the waiver was knowing and intelligent.

In *Mott*, supra, the court stated:

*We think that even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be*

*allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open.*

Mott, *supra*, at 52, quoting *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir.1965).

However, under Massachusetts law, which is more liberal than *Von Moltke*, it is necessary for the trial judge to inquire into the defendant's motivation. "The motivation of the accused in making the request should be examined, and the accused should be apprised of the pitfalls in proceeding *pro se*." Mott, *supra*, at 52.

### *Subdivision (f)*

This subdivision is drawn from Rules of Criminal Procedure (U.L.A.) rule 711 (1974). See ABA Standards Relating to the Function of the Trial Judge § 6.7 (Approved Draft, 1972).

As long as the standby counsel assists only when called upon by the defendant and calls the attention of the court to matters favorable to the defendant upon which the court should rule upon its own motion, there is no interference with the defendant's representing himself. See *Illinois v. Allen*, 90 S.Ct. 1057, 397 U.S. 337, 25 L.Ed.2d 353 (1970); *Commonwealth v. Maynard*, 2 Mass.App. 894, 319 N.E.2d 453 (1974) (Rescript).

*A judge has broad discretion to appoint and order payment of ... counsel to represent or advise ... [an indigent defendant], to whatever extent he will accept representation, advice, and assistance, in an effort to ensure a fair, orderly and expeditious trial.*

*Jackson v. Commonwealth*, 370 Mass. 855, 856, 346 N.E.2d 714 (1976) (Rescript).

## **Rule 9: Joinder of Offenses or Defendants**

(Applicable to District Court and Superior Court)

### **(a) Joinder of Offenses**

#### *(1) Related Offenses*

Two or more offenses are related offenses if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.

## *(2) Joinder of Related Offenses in Complaint or Indictment*

If two or more related offenses are of the same or similar character, they may be charged in the same indictment or complaint, with each offense stated in a separate count.

## *(3) Joinder of Related Offenses for Trial*

If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice.

## *(4) Joinder of Unrelated Offenses*

Upon the written motion of a defendant, or with his written consent, the trial judge may join for trial two or more charges of unrelated offenses upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice.

## **(b) Joinder of Defendants**

Two or more defendants may be joined in the same indictment or complaint if the charges against them arise out of the same criminal conduct or episode or out of a course of criminal conduct or series of criminal episodes so connected as to constitute parts of a single scheme, plan, conspiracy or joint enterprise. The defendants may be charged separately or together in one or more counts; all of the defendants need not be charged in each count.

## **(c) Consolidation of Offenses or Defendants on Motion of Court**

The trial judge may order two or more indictments or complaints to be tried together if the offenses and the defendants, if more than one, could have been joined in a single indictment or complaint. The procedure shall be the same as if the prosecution were under a single indictment or complaint.

## (d) Relief From Prejudicial Joinder

### *(1) In General*

If it appears that a joinder of offenses or of defendants is not in the best interests of justice, the judge may upon his own motion or the motion of either party order an election of separate trials of counts, grant a severance of defendants, or provide whatever other relief justice may require.

### *(2) Motion by the Defendant*

A motion of the defendant for relief from prejudicial joinder shall be in writing and made before trial and shall be supported by an affidavit setting forth the grounds upon which any alleged prejudice rests, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known.

## (e) Conspiracy

An indictment or complaint for conspiracy to commit a substantive offense shall not be tried simultaneously with an indictment or complaint for the commission of the substantive offense, unless the defendant moves for joinder of such charges pursuant to subdivision (a) of this rule.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

The substance of Rule 9 is taken from several sources. These are Fed. R. Crim. P. 8 and 13, the ABA Standards Relating to Joinder and Severance (Approved Draft, 1968), Uniform Rules of Criminal Procedure (U.L.A.) rules 471-73 (1974), and ALI Model Penal Code §§ 1.07-1.09 (1962). See *Commonwealth v. Gallarelli*, Mass. Adv. Sh. (1977) 1013, 1023-24 (Kaplan, J., concurring). The language is drawn largely from the Uniform Rules.

### *Subdivision (a)*

Although subdivisions (a) and (b) of the rule are consistent with their statutory precedent, former G.L. c. 277, § 46 (St. 1861, c. 181), the rule is more explicit in defining what charges may be joined in a single indictment.



Related offenses are defined in (a)(1) as those which 1) are based on the same criminal conduct or episode, or 2) arise out of a course of criminal conduct or a series of criminal episodes connected together or constituting parts of a single scheme or plan. “Conduct” means an act or omission to act; “episode” means an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series. ABA Standards Relating to Joinder and Severance § 1.3(a), comment at 20-21 (Approved Draft, 1968).

Under Federal Rule 8, offenses may be joined if they 1) are based on the same transaction, 2) are parts of a common scheme or plan, or 3) are of the same or similar character. Offenses that are based on the same underlying facts or are each part of a larger plan are related in such a way as to insure an overlap in the evidence to be presented upon each offense.

Rule 9 takes the position that the goal of judicial economy will rarely be paramount to affording the defendant a trial as free from prejudice as possible; therefore, joinder of unrelated offenses is prohibited except at the instance of the defendant or with his written consent.

Rule 9 permits joint trial of offenses committed in furtherance of a common scheme or plan, but factually independent, and thus conforms to case law under former G.L. c. 277, § 46.

General Laws c. 277, § 46, which governed joinder of offenses, stated:

*“Two or more counts describing different crimes depending upon the same facts or transactions may be set forth in the same indictment if it contains an averment that the different counts therein are different descriptions of the same acts.”*

If read narrowly the statute would prohibit joint trial of offenses which were part of a joint scheme or plan, but not dependent upon the same underlying facts. The statute has, however, been interpreted more broadly, allowing joint trial of offenses related in ways other than as literally permitted by § 46. See e.g., *Harding v. Commonwealth*, 283 Mass. 369 (1933).

Subdivision (a)(3) allows the parties to request that the charges pending against the defendant be joined for trial. By granting the court discretionary power to deny the defendant’s motion to join the charges, the rule protects the prosecution from being effectively “forced” to try charges on which it has not yet organized a sufficient case to warrant proceeding. See Mass. R. Crim. P. 37(a), (b)(2), which require the approval of the prosecutor for charges to be transferred for plea, sentence, or trial.

## Subdivision (b)

This subdivision is in form virtually identical to the corresponding federal rule provision, but substitutes “conduct” and “criminal episode” for the terms used in the federal rule, “act” and “transaction.”

Although there is no statute in the Commonwealth analogous to the joinder of defendants provision contained in subdivision (b), it seems to be in harmony with former Massachusetts practice. Prior to the promulgation of these rules, such joinder was permitted in two instances: when the defendants were charged with joint participation in a single series of events based on identical facts, *Commonwealth v. Nicholson*, 4 Mass. App. Ct. \_\_\_\_ (1976), Mass. App. Ct. Adv. Sh. (1976) 170; *Englehart v. Commonwealth*, 353 Mass. 561 (1968), and when there existed sufficient evidence to indicate that the defendant and co-defendant were engaged in a common enterprise, and the issue of fact to be tried against each defendant was similar, as in *Commonwealth v. Smith*, 353 Mass. 442 (1968).

## Subdivision (c)

This subdivision allows otherwise permissive joinder of offenses or defendants to be accomplished by the trial court on its own motion. This provision is included in order to achieve the principle goal of the rule, judicial economy, while protecting the defendant’s right to a reasonably prejudice-free trial. Although it is contemplated that joinder will be effected by the prosecution at the indictment or complaint stage in all possible cases, should the prosecution elect to proceed in a manner contrary to the goal of judicial economy this subsection empowers the court to rectify the situation on its own motion without having to depend on a motion by the defendant. Compare *Commonwealth v. Benjamin*, 358 Mass. 672, 678 (1971) (order for amendment of indictments).

## Subdivision (d)

Subdivision (d)(1) is essentially drawn from Fed. R. Crim. P. 14 and is consonant with prior Massachusetts practice. Subdivision (d)(2) is taken from ABA Standards Relating to Joinder & Severance § 2.1(a) (Approved Draft, 1968).

*As a general proposition, the decision whether to allow a motion to sever two or more indictments which have been joined for purposes of trial rests in the sound discretion of the trial judge.*

*Commonwealth v. Jervis*, 368 Mass. 638, 645 (1975). Accord, *United States v. Luna*, 585 F.2d 1, 4-5 (1st Cir. 1978); *Commonwealth v. Cruz*, Mass. Adv. Sh. (1977) 2395, 2411; *Commonwealth v. Drew*, 4 Mass. App. Ct. \_\_\_\_, \_\_\_\_ (1976), Mass. App. Ct. Adv. Sh. 48, 52-53.

Where “substantially the same evidence, or evidence connected with a single line of conduct,” *Commonwealth v. Rosenthal*, 211 Mass. 50, 54 (1912), substantiates two or more indictments for “offenses [which] are kindred and liable to punishment of the same general character,” *Commonwealth v. Veal*, 362 Mass. 877 (1972) (Rescript), there is no abuse of discretion in denying the defendant’s motion for severance. *Commonwealth v. Drew*, *supra*, at 53. The legal standards which must guide the exercise of the court’s discretion in determining a motion to sever have been articulated as follows:

*No sound reason can be given why several indictments charging different crimes arising out of a single chain of circumstances should not be tried together. Where several offenses might have been joined in one indictment, and would be proved by substantially the same evidence, or evidence connected with a single line of conduct, and grow out of what is essentially one transaction, and where it does not appear that any real right of the defendant has been jeopardized, it would be a refinement not demanded by the law or by justice to require in all instances a separate trial, simply because separate indictments have been found for each offense.*

*Commonwealth v. Cruz*, Mass. Adv. Sh. (1977) 2395, 2411-12. Accord *Commonwealth v. Blow*, 362 Mass. 196, 200 (1972); *Commonwealth v. Rosenthal*, *supra*.

The assertion of prejudicial joinder does not challenge the propriety of the initial order for consolidation. Rather, the prejudice is found in facts peculiar to a defendant’s case. Defendants may move for severance of their cases, or of counts therein, on the grounds of misjoinder and prejudicial joinder.

Misjoinder. It is important to know what the minimal grounds for joinder of defendants or offenses are when considering a claim of misjoinder because such a claim is an assertion that the minimal requirements have not been satisfied. Thus, when a motion for severance of defendants or for separate trials of more than one count is based on the ground that the consolidated offenses should not have been joined, i.e., that there has been a misjoinder, the standards upon which the motion is to be judged are stated in subdivisions (a)(1)-(2) of this rule.

A misjoinder can result in two ways. First, the offenses joined might have been improperly joined in one indictment and, secondly, two indictments may have been improperly consolidated for trial. In both cases, however, the same standard is to be used to determine the propriety of the joinder.

Two other aspects of this subdivision deserve mention. First, subdivision (d)(1) permits a court to grant a severance upon its own motion. Although this authorizes a court to review

its initial order of consolidation of the charges for trial to see if the minimum grounds are satisfied, its primary significance is that it permits the court to exercise its discretion in deciding initially whether to proceed by joint or separate trials even though one of the minimum grounds for joinder is satisfied. In effect, this provision permits the trial judge to consider the prejudice to the defendant in his initial decision as well as at later stages of the trial.

Secondly, it is recommended in the ABA Standards Relating to Joinder and Severance § 2.1(c)-(d), comment at 28 (Approved Draft, 1968), that a motion by the prosecution for severance, unless consented to by the defendant, be required to be made prior to trial to avoid giving the defendant upon retrial the defense of double jeopardy. As is stated therein, however, this proposition does not derive from any judicial holdings to that effect. While this subdivision contemplates that prosecution motions for severance shall be limited to a pretrial posture, it is likely that if a severance upon the prosecution's motion after the commencement of trial is a "manifest necessity" such that the "ends of public justice would otherwise be defeated," *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, (1824), courts of this Commonwealth would hold that the severance was not a bar to future prosecution on the severed charges, even if the defendant did not consent. Compare *Price v. Slayton*, 347 F.Supp. 1269 (W.D. Va. 1972).

Prejudicial Joinder. Satisfying the minimum joinder standards is only one consideration affecting a court's decision on consolidation. The court is lodged with the discretion to determine in each case whether justice would be served better by joint or separate trials. The countervailing considerations affecting this decision are the defendant's interests and the interests of the court and prosecution in having the adjudication as short and as inexpensive as possible. The merits of each side's claims will differ from case to case. Only the trial judge is in a position to balance effectively the competing interests, and, in most cases, his discretion is very broad.

In its initial decision upon the issue of consolidating charges for a single trial, in addition to determining whether minimum grounds for joinder exist, the court should consider whether the defendant would be adversely affected by joinder. If he would and if this prejudice overrides the interests of the prosecutor, the public, and the courts in an expeditious trial, joinder should not be ordered.

At any stage after joinder has been ordered, the court on motion of the defendant or on its own motion may wish to reconsider whether the interests of justice are better served by separate trials. At such time, the court should again weigh the competing interests as well as considering how far the prosecution of the charges has proceeded and whether a severance would involve an undue relitigation of issues already presented to the court. In

both its initial decision and at any later reconsideration of prejudice to the defendant, the court is determining whether there exists a prejudicial joinder of charges.

The Supreme Judicial Court summarized the duty of the trial court in protecting a defendant's rights as follows:

*It is the heavy obligation of the trial court sedulously to take care that the defendant is not confounded in his defense, that the attention of the jury is not distracted and that in no aspect are the substantial rights of the defendant adversely affected by requiring him to proceed to trial on separate complaints for different offenses or on separate counts for different offenses in one complaint.*

Commonwealth v. Slavski, 245 Mass. 405, 412-13 (1923). It is made clear by the court that the trial court's discretion is circumscribed by its duty to guarantee a fair trial.

A court may find prejudice on its own motion or the motion of either party. However, where a defendant initiates the motion for relief from prejudice, he has a strong burden of persuasion. *Sagansky v. United States*, 358 F.2d 195 (1st Cir. 1966), cert. denied, 385 U.S. 816. This heavy burden is placed upon the defendant because the trial judge has already determined once that the defendant was not likely to be prejudiced by consolidated trials.

A defendant first must make his motion at the appropriate time. If a motion is filed before the prejudicial grounds have materialized, the motion should be dismissed. The grounds of prejudice may become known to a defendant at any stage of the pretrial or trial proceedings. He has the duty to inform the court of these grounds whenever he first learns of them. If a motion is made at trial based upon grounds known prior to the commencement of the trial, the defendant has waived his opportunity to object. Subdivision (d)(2).

Secondly, a defendant has the related burden of showing a specific ground of prejudice. It is not enough for a defendant merely to claim that his chances of acquittal are reduced in a joint trial, or that a joint trial presents him with a number of potential dangers. The defendant must point to definite prejudice that presently exists.

One other class of cases deserves mention. In these, a separate trial must be granted because of an established principle of law; the decision is non-discretionary. In cases not of this class, the decision regarding a joint trial rests upon the peculiar arrangement of the facts, whereas here the facts are less significant. This class is composed mostly of claims that a defendant's constitutional rights will be infringed by a consolidated trial. *Bruton v. United States*, 391 U.S. 123 (1968), establishes the most significant principle in this area. Basing its decision on a defendant's sixth amendment right to confront adverse witnesses, the Supreme Court held that a severance was required where a codefendant's confession

implicating the defendant is to be offered at trial. It had always been true that such a confession was inadmissible against the non-confessor, but prior to this decision a limiting instruction to the jury was deemed sufficient to protect the rights of the non-confessing defendant. The distinction between this decision and others where continued reliance on jury instructions is found is that a defendant's constitutional right is in issue here and less flexibility in balancing competing interests is tolerated.

The scope of the Bruton decision has been delimited since the time of its issuance, and a severance is not always required where one defendant's confession mentions other participants in the criminal acts. The following are examples where a severance is not required:

1. *Commonwealth v. Scott*, 355 Mass. 471 (1969), holds that a confession implicating the defendant may be admitted in a joint trial when the defendant does not contest his participation in the crime. This occurs when a defendant asserts a special defense, e.g., insanity.
2. When the statement refers to other participants without identifying them or when the statement can be cured of any constitutional defect by excision, it may be admitted at a joint trial. See *Commonwealth v. French*, 357 Mass. 356 (1970); ABA Standards, *supra*, § 2.3(a). But sufficient identification may be found even when names are not used. *Commonwealth v. Sarro*, 356 Mass. 100 (1969).
3. The confessing co-defendant can testify at trial, thereby giving the implicated defendant the opportunity to cross-examine the witness on any statements made by him that were admitted at trial. *Santoro v. United States*, 402 F.2d 920 (9th Cir. 1968). See *Commonwealth v. Hicks*, Mass. Adv. Sh. (1979) 1; *Commonwealth v. Murphy*, Mass. App.Ct. Adv. Sh. (1978) 533.

Another example of a severance being required because of the threat of impairing a defendant's constitutional rights is offered by *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). Only one defendant took the stand, and his counsel commented upon the failure of his client's co-defendant to testify in an attempt to show that only an innocent defendant has the courage to deny his guilt at trial. The Court of Appeals held it error to permit one defendant to comment adversely upon his co-defendant's exercise of his fifth amendment privilege not to testify.

In sum, prejudice to a defendant is to be found in the facts of his case. Most claims of prejudice are to be decided by the trial court in the exercise of its discretion, and the majority of these claims are rejected. A severance is required in some cases because certain facts relating to either trial strategy or the nature of the offenses establish as a

matter of law the existence of prejudice. In other cases, a severance is mandated by constitutional considerations.

### *Subdivision (e)*

This subdivision prohibits trial on an indictment or complaint for conspiracy to commit a substantive offense simultaneously with the trial on the substantive offense, except upon motion of the defendant. This provision is retained from former G.L. c. 278, § 2A (St. 1968, c. 721, § 2) pursuant to which the prohibition against joint trials of the conspiracy and substantive charges was absolute. See *Commonwealth v. Gallarelli*, Mass. Adv. Sh. (1977) 1013, 1017. Under this rule, however, the defendant may move for joinder of such charges.

The Supreme Judicial Court has noted that “[t]he legislative history affords no indication of why § 2A, which may add new complications to enforcement of the criminal law, was adopted at all . . . .” *Commonwealth v. French*, 357 Mass. 356, 375 n.20 (1970). Accord *Commonwealth v. Gallarelli*, Mass. Adv. Sh. (1977) 1013, 1024 (Kaplan, J., concurring). The intent of the rule is to guard against the possibility that a jury, if permitted to hear evidence on both the conspiracy and the substantive offense, might convict on the charge of the substantive offenses as a matter of course after convicting on the conspiracy charge, in spite of the court’s instruction as to the distinct evidence required to establish a conspiracy. This is because of the much broader scope of admissibility of evidence permitted to prove the conspiracy charge.

The defendant should be allowed to proceed by a joint trial, however, so long as it is determined by the judge to be in the best interests of justice. This practice accords with that under Fed. R. Crim. P. 8(b), pursuant to which conspiracy and substantive charges may be joined. E.g., *United States v. Graham*, 548 F.2d 1302, 1310 (8th Cir. 1977); *United States v. Beasley*, 519 F.2d 233, 238 (5th Cir. 1975); *United States v. Banks*, 465 F.2d 1235, 1242-43 (5th Cir.), cert. denied, 401 U.S. 924 (1972); *Gordon v. United States*, 438 F.2d 858, 878 (5th Cir.), cert. denied sub nom., *Crandall v. United States*, 404 U.S. 828 (1971). See ABA Standards Relating to Joinder and Severance § 1.2(b), comment at 15 (Approved Draft, 1968).

## **Rule 10: Continuances**

(Applicable to District Court and Superior Court)

## (a) Continuances

- (1) After a case has been entered upon the trial calendar, a continuance shall be granted only when based upon cause and only when necessary to insure that the interests of justice are served.
- (2) The factors, among others, which a judge shall consider in determining whether to grant a continuance in any case are:
  - (A) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice.
  - (B) Whether the case taken as a whole is so unusual or so complex, because of the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation of the case at the time it is scheduled for trial.
  - (C) Whether the overall caseload of defense counsel routinely prohibits his making scheduled appearances, whether there has been a failure of diligent preparation by a party, and whether there has been a failure by a party to use due diligence to obtain available witnesses.
- (3) An attorney who is to be otherwise engaged in a trial, evidentiary hearing, or appellate argument so as to require a continuance shall notify the court and the adverse party or the attorney for the adverse party of such conflicting engagement not less than twenty-four hours before the scheduled appearance, or within such other time as is reasonable under the circumstances.
- (4) A motion for a continuance may include a request that the court rule on the motion without a hearing. If such a motion is filed at least three court days prior to the scheduled appearance or trial date and indicates that all parties have agreed to the continuance, the court shall, prior to the scheduled date, rule on the motion without a hearing unless it deems a hearing to be necessary. In any other case, the court may in its discretion rule on a continuance motion without a hearing, provided that all parties have had an adequate opportunity to file an opposition to the motion. If the court continues the case without a hearing, defendant's counsel shall inform the defendant of the revised date. Any motion filed pursuant to this subdivision shall provide one or more proposed continuance dates and state all supporting grounds, and any factual allegations shall be supported by affidavit.

## (b) Assessment of Costs

When a continuance is granted upon the motion of either the Commonwealth or the defendant without adequate notice to the adverse party, causing the adverse party to incur



unnecessary expenses, a judge may in his discretion assess those expenses as costs against the party or counsel requesting the continuance.

## (c) Preservation of Testimony

A judge may order as a condition upon the granting of a continuance that the testimony of a witness then present in court be taken and preserved for subsequent use at trial or any other proceeding. The witness shall be examined in open court by the party on whose behalf he is present and the adverse party shall have the right of cross-examination. The expense of taking and preserving the testimony shall be assessed as costs against the party requesting the continuance.

## Rule History

*Amended October 14, 1997, effective December 1, 1997.*

## Reporter's Notes

### (1997)

(a)(4). In 1997, Rule 10 was amended by adding new subsection (a)(4). This amendment allows the judge to rule on a continuance motion without a hearing, provided all other parties have had a chance to file an opposition to the motion. Previously a continuance motion was often argued in court, even if it was agreed to by all parties, because no other formal procedure was available. Either the case was advanced for hearing on the motion, compounding client expense and court congestion; or the continuance motion was argued on the trial day, leaving parties uncertain whether it would be granted and requiring the defendant and witnesses to be present in case the motion was denied. Subsection (a)(4) is designed to rectify these problems and provide a more efficient procedure, while continuing to maintain ultimate authority in the court over whether to grant a continuance even when the parties are in agreement.

Criminal Rule 10 continues to provide for a ruling by the judge on a continuance motion in every case, consistent with Uniform Magistrate's Rule 2. Although this rule generally permits actions on uncontested, non-evidentiary motions by the magistrate, subdivision (c) prohibits the magistrate from acting on continuances.

As with Rule 7, when a case is continued in the absence of the defendant, defense counsel is charged with the responsibility of so notifying his or her client.

(1979)

This rule is modeled in part after 18 U.S.C. § 3161(h)(8)(B) (C) (Supp. 1, 1975). Subdivisions (b) and (c), while novel to Massachusetts criminal practice, are not without precedent, see Superior Court Rule 21 (1974); District Court Supplemental Rule of Civil Procedure 103 (1975); G.L. c. 276, § 50.

### Subdivision (a)

This subdivision is modeled after 18 U.S.C. § 3161(h)(8)(B)-(C) (Supp. 1, 1975). The controlling principle underlying this subdivision is that a continuance should be granted only when justice requires. See ABA Standards Relating to Speedy Trial § 1.3 (Approved Draft, 1968); the Defense Function § 1.2(b), (c) (Approved Draft, 1971); the Prosecution Function § 2.9(a), (c) (Approved Draft, 1971); Rules of Criminal Procedure (U.L.A.) rule 721(d) (1974). Consensual continuances and continuances which are helpful, but which fall short of being necessary, are not to be granted, because in such cases justice is generally promoted by proceeding to trial without delay and because the need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings. Compare *Commonwealth v. Silva*, Mass. App. Ct. Adv. Sh. (1978) 374 (Rescript).

Whether a motion for a continuance should be granted traditionally lies within the discretion of the trial judge, whose action will not be disturbed unless there is a clear abuse of discretion. *Commonwealth v. Jackson*, Mass. Adv. Sh. (1978) 3062, 3064; *Commonwealth v. Watkins*, Mass. Adv. Sh. (1978) 1646, 1671; *Commonwealth v. Grieco*, 5 Mass. App. Ct., (1977), Mass. App. Ct. Adv. Sh. (1977) 598, 604. In ruling on a motion for a continuance, the judge should balance the moving party's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party, as well as giving due weight to the interest of the judicial system in avoiding delays which would not measurably contribute to the resolution of a particular controversy. *Commonwealth v. Gilcrest*, 364 Mass. 272, 276-77 (1973). Accord *Commonwealth v. Greico*, supra, at 605, Mass. App. Ct. Adv. Sh. (1977) 598.

Common grounds asserted by counsel as a basis for a requested continuance are: "Illness of the defendant or important witnesses or defense counsel, conflicting engagements of counsel, lack of time for preparation by counsel or prejudicial publicity or a combination of several of the factors. . . ." 30 Mass. Practice Series (Smith) § 1013 (1970, Supp. 1978).

A determination of a motion for a continuance to secure the attendance of witnesses will depend upon a showing that the desired testimony is of more than "marginal significance" and not "merely cumulative" to or corroborative of other available testimony to the same

effect. *Commonwealth v. Watkins*, Mass. Adv. Sh. (1978) 1646, 1670-71; *Commonwealth v. Funderberg*, Mass. Adv. Sh. (1978) 601, 605; *Commonwealth v. Hanger*, Mass. App. Ct. Adv. Sh. (1978) 633, 648, *aff'd*, Mass. Adv. Sh. (1979) 647; *Commonwealth v. Darden*, 5 Mass. App. Ct. \_\_\_, \_\_\_ (1977), Mass. App. Ct. Adv. Sh. (1977) 891, 903. Where the adverse party would not be prejudiced by a continuance and the testimony is significant, a denial of the continuance constitutes an abuse of discretion, *Commonwealth v. Silva*, Mass. App. Ct. Adv. Sh. (1978) 374 (Rescript), assuming that the desired witness may be expected to become available within a reasonable time. Compare *Commonwealth v. Ambers*, 4 Mass. App. Ct. \_\_\_, \_\_\_ (1976), Mass. App. Ct. Adv. Sh. (1976) 1141, 1150 (witness missed ride) with *Commonwealth v. Swenor*, 3 Mass. App. Ct. 65, 66-67 (1975) (witness in federal custody; authorities would not honor writ of habeas corpus ad testificandum). See *Commonwealth v. Hanger*, Mass. App. Ct. Adv. Sh. (1978) 633, 647. Subdivision (a)(2)(C) adds as a consideration that the moving party must have exercised due diligence to obtain the presence of available witnesses.

As for conflicting engagements of counsel, subdivision (a)(2)(C) indicates that delays attributable to the heavy case load of desired defense counsel which would prevent the commencement of trial for an unreasonable time period do not establish good cause for a continuance. The right of a defendant to retain counsel of his choice does not include the right to choose an attorney who is unable to comply with the demands of the trial calendar. *United States v. DiStefano*, 464 F.2d 845, 846 n.1 (2d Cir. 1972) See *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir. 1977); *United States v. Tortora*, 464 F.2d 1202, 1210 (2d Cir. 1972); *Commonwealth v. Perry*, Mass. App. Ct. Adv. Sh. (1978) 840, 850.

Other conflicting engagements of counsel afford no right to the continuance of any particular case. . . . [T]his is the only way in which the trial of causes can proceed in an orderly and expeditious way under present conditions. . . . No attorney can accept . . . a larger number of cases than he can try as and when they are reached and expect courts to continue any case for his convenience or that of his clients.

*Commonwealth v. Festo*, 251 Mass. 275, 277 (1925). See *Commonwealth v. Dabrieo*, 370 Mass. 728, 736-37 (1976) (counsel was engaged in court appearances in several counties and “unavailable for trial of this case” for seven months). There are those instances, however, where a conflicting engagement is unavoidable and justice would best be served by the granting of a continuance. In such an instance, subdivision (a)(3) requires counsel to notify the court and the adverse party of the conflict in order to minimize their inconvenience.

The sixth and fourteenth amendments to the United States Constitution, which afford a defendant the right to counsel in a prosecution which may result in a loss of liberty,

*Argersinger v. Hamlin*, 407 U.S. 25 (1972), are not satisfied by the mere presence of a competent attorney if that attorney is not prepared. *Commonwealth v. Cavanaugh*, 371 Mass. 46, 57 (1976). In addition to the factors listed in subdivision (a)(2)(B) relative to the reasonableness of expecting adequate preparation, the court may consider the length of time the attorney has been assigned or appointed to the case. In ruling on a motion for a continuance on this ground, the judge's discretion cannot be exercised so as to impair the constitutional right to prepared counsel; a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right . . . an empty formality."

*Commonwealth v. Cavanaugh*, supra, 371 Mass. at 51. On the other hand, where there is ample justification for the conclusion that a last-minute claim of lack of preparation is merely a dilatory tactic, is unsupported by the facts, or is the result of a failure of diligent preparation, a denial of a continuance is no abuse of discretion. *Commonwealth v. Jackson*, Mass.Adv.Sh. (1978) 3062, 3064, 3070; *Commonwealth v. Perry*, Mass.App.Ct. Adv. Sh. (1978) 840, 848-50; subdivision (a)(2)(C). See also *Commonwealth v. Coward*, Mass.App.Ct.Adv.Sh. (1979) 273 (Rescript).

Pursuant to Mass.R.Crim.P. 11(a)(2)(B) and (b)(2)(B), if the required pretrial conference report is not filed and a party does not appear at the scheduled time to explain the failure, "no request of that party for a continuance of the trial date . . . shall be granted. . . ."

## Subdivision (b)

This subdivision deviates from previous Massachusetts criminal procedure. Former practice dictated that if a continuance was granted, each party was to bear his own costs, unless the defendant was assessed the costs of prosecution. See generally G.L. c. 280, § 6. However, the courts have long applied a similar assessment rule to the costs of continuances in civil proceedings. Superior Court Rule 21 (1974) provides, and District Court Civil Rule 16 (1965) provided, that when a case is postponed on the motion of a party, that party may be responsible for the costs and expenses of the adverse party in addition to his own.

The decision to assess the costs rests solely within the discretion of the judge, and payment is to be made directly to the adverse party for the benefit of whomever incurred the expenses and not to the court. The purposes of this rule are to discourage parties or their attorneys from requesting continuances on short notice and to reimburse parties for expenses they incur as a result of the tardiness of the adverse side in requesting a continuance. As stated in the District Court and Superior Court rules, supra, the court should not assess costs against a party in cases where his opponent has incurred expenses because of a requested continuance when: 1) the continuance is granted because of improper conduct of the adverse party; or 2) adequate notice was in fact given

the adverse party (see [a][3], *infra*); or 3) grounds for the continuance were not discovered in time to give sufficient notice to prevent the expense to the adverse party.

Assessable costs under this rule are those costs directly caused by the insufficient notice. Assessable costs generally include witness fees, extra compensation paid to police witnesses, travel costs, costs of depositions pursuant to subdivision (c), *infra*, and perhaps stenographers' attendance fees in District Court. See Mass.R.Crim.P. 6(d)(1).

## Subdivision (c)

A new practice is instituted by this subdivision: if a witness is present in court and a party has requested a continuance, the judge may condition the grant of the continuance upon the taking and preservation of that witness' testimony for use at trial or other proceeding. While similar in many respects to a court-ordered deposition after a finding that a witness was unlikely to appear at the continued proceeding (former G.L. c. 276, § 50 [St. 1851, c. 71]), the procedure permitted under this rule is not termed a deposition. This is to avoid conflict with the formal summons and notice requirements of Mass.R.Crim.P. 35(b)(c)(h). In all other respects the procedure is compatible with Rule 35 deposition practice.

While utilization of the procedure established by this subdivision should be undertaken only in "exceptional circumstances" when "deemed to be in the interests of justice," Mass.R.Crim.P. 35(a), it is not intended to be so restricted as that under Mass.R.Crim.P. 6(d)(2), pursuant to which testimony may be taken upon the default of a defendant only if "to require the attendance at a later time of a witness . . . would constitute a hardship because of age, infirmity, illness, profession or other sufficient reason." Once taken and preserved, the witness' testimony may be used as substantive evidence in any subsequent proceeding as if the witness were "unavailable" under Mass.R.Crim.P. 35(g).

This procedure does not deny the defendant's right to confrontation of witnesses, since it is presumed that the defendant will be present when the continuance is requested and the witness will, of course, be in attendance. The witness is to be examined in open court by the party calling him and the adverse party is permitted to cross-examine. In these circumstances, the constitutional requirement is satisfied. *Commonwealth v. DiPietro*, 373 Mass. 369, 367 N.E.2d 811 (1977); *aff'g Commonwealth v. DiPietro*, 4 Mass.App. 845, 356 N.E.2d 269 (1976).

# Rule 11: Pretrial Conference and Pretrial Hearing

(Applicable to cases initiated on or after September 7, 2004)

## (a) The Pretrial Conference

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.

### *(1) Conference Agenda*

Among those issues to be discussed at the pretrial conference are:

- (A) Discovery and all other matters which, absent agreement of the parties, must be raised by pretrial motion. All motions which cannot be agreed upon shall be filed pursuant to Rule 13(d).
- (B) Whether the case can be disposed of without a trial.
- (C) If the case is to be tried, (i) the setting of a proposed trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) the probable length of trial; (iii) the availability of necessary witnesses; and (iv) whether issues of fact can be resolved by stipulation.

### *(2) Conference Report*

#### **(A) Filing**

A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court pursuant to subdivision (b)(2)(i). The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be

the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

## **(B) Failure to File**

If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall notify the clerk of such failure. If a conference report is not filed and a party does not appear at the pretrial hearing, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report or do not appear at the pretrial hearing, the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

## **(b) The Pretrial Hearing**

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be available for attendance at the hearing. The pretrial hearing may include the following events:

### ***(1) Tender of Plea***

The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

### ***(2) Pretrial Matters***

Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

- (i) Filing of Pretrial Conference Report. The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.
- (ii) Discovery and Pretrial Motions. The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.
- (iii) Compliance and Trial Assignment. The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial

date or trial assignment date. If completion of either the pretrial conference report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

- (iv) The court may issue such additional orders as will promote the fair, speedy and orderly disposition of the case.

## (c) Compliance Hearing

A compliance hearing ordered pursuant to Rule 11(b)(2)(iii) shall be limited to the following court actions:

- (1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;
- (2) receiving and acting on a tender of plea or admission; and
- (3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

## Rule History

*Amended March 8, 2004, effective September 7, 2004.*

## Reporter's Notes

### *Revised (2004)*

Rule 11 is designed to promote the speedy and orderly disposition of cases at a time certain which is most convenient to all parties, and to that end it calls upon defendants' counsel to aid the court in the disposition of all preliminary motions and other matters relative to pending cases. See *Commonwealth v. Durning*, 406 Mass. 485, 495 (1990). Although the title of the rule would appear to limit its application to those cases which are destined to be tried, it is intended that in some cases the conference will result in the resolution of issues so as to make trial unnecessary. At the least the pretrial conference should assist the parties in channeling their attention and resources to matters genuinely in issue and aid the court in focusing the elaborate mechanism of a full trial upon the material issues in dispute.

*The 2004 Amendments.* In 2004, the Rule was substantially rewritten to mandate a uniform pretrial process in all criminal courts. Under the rule, at arraignment (except on a



complaint regarding which the court will not exercise final jurisdiction, in which case a probable cause hearing will be scheduled as required by Rule 7), the court will schedule the case for both a pretrial conference and a pretrial hearing, to be held on separate dates. Following the pretrial conference, the parties will prepare a pretrial conference report, memorializing their agreements and disagreements. This report controls the scope of subsequent motions practice. Rule 11 also mandates a pretrial hearing on a subsequent date, at which a plea may be taken or pretrial matters may be raised and/or resolved. Rule 11 as revised reflects this three step process, setting out the functions of the pretrial conference, the report, and the pretrial hearing. Additionally, if discovery remains incomplete at the time of the pretrial hearing, a compliance hearing will be scheduled to insure that discovery is complete before the case proceeds.

## Subdivision (a)

The Pretrial Conference and Conference Report. Rule 11 originally required pretrial conferences in both Superior and District Court jury sessions, leaving the District Court primary session with the option of scheduling a conference or not. By a 2004 amendment, pretrial conferences are now mandatory in all cases, regardless of whether the case is docketed in a superior, juvenile, district, or municipal court. Under Rules 7 and 11, at arraignment the court will schedule the case for both a pretrial conference and a pretrial hearing. Regarding the pretrial conference, the rule allows but does not require the court to order that this conference take place before a judge or magistrate. The Boston Municipal Court practice of holding a conference before a magistrate has proven quite efficient, but because some district courts may not have adequate personnel and courtrooms for this purpose the subdivision leaves this issue to be determined by each court.

Subdivisions (a)(1)(A)-(C) outline suggested issues which may be discussed and resolved prior to the trial. The catalog is not to be considered exhaustive.

Subdivision (a)(1)(A), in conjunction with Mass. R. Crim. P. 13, seeks to reduce the number of “boiler plate” pretrial motions which are routinely filed. See *Commonwealth v. Hall*, 369 Mass. 715, 723 (1976). If the substance of a motion is agreed upon, that fact and the agreement are set out in the conference report [(a)(2)(A)], *infra*; only pretrial motions which are not agreed upon are permitted to be filed. Mass. R. Crim. P. 13(d).

While it is unlikely that a plea arrangement will immediately result from the conference, the defendant, following disclosure of the Commonwealth’s case, may decide that a plea is the best alternative. Therefore, the subject is properly discussed at that time [(a)(1)(B)]. If an arrangement is in fact concluded, it should be stated in the conference report. See Mass.

R. Crim. P. 12(b)(2), which requires counsel to notify the court of the existence of any agreement contingent upon the defendant's plea.

Among the matters to be discussed under subdivision (a)(1)(C)(i) is the setting of the trial date. It must be emphasized that one consequence of a failure to comply with this rule is that the case will be presumed to be ready for trial and a trial date will be set for the earliest available time, [a] [2] [B], *infra*. Agreements as to subdivision (C)(ii) will assist the court in the management of its docket, see Mass. R. Crim. P. 36(a)(2), and understandings as to the availability of necessary witnesses will reduce the need for continuances to secure their attendance, Mass. R. Crim. P. 10. If stipulations of fact are agreed upon after discussion under (C)(iv) they are to be recorded in the conference report, [a] [2] [A], *infra*.

The defendant may also request information concerning the Commonwealth's intended use of prior acts or convictions for proof of knowledge, intent, or *modus operandi*, and use of prior convictions to impeach the testimony of the defendant. This information, while not specifically mentioned in Rule 11, is a proper subject of discussion at the pretrial conference. It is contemplated that compliance with this subdivision will obviate the necessity for resorting to the more time-consuming procedures of Mass. R. Crim. P. 14 and 23, expedite the taking of testimony at the trial, and allow counsel to better prepare for trial.

Pursuant to Mass. R. Crim. P. 9(a)(3), either party may move for consolidation of pending charges. This matter, if resolved at conference, will avoid the time delay required for the court to conduct a hearing and act upon a motion for joinder. This is true also as to motions to transfer other pending charges for plea, sentence or trial. Mass. R. Crim. P. 37(b)(1)-(2).

It should be noted that a motion to take a deposition, not contemplated within subdivision (a)(1) of this rule, if considered at conference and agreed upon, need not be filed with the court, since the parties are permitted to depose witnesses by agreement pursuant to Mass. R. Crim. P. 35(i).

The parties may also wish to stipulate as to the application and effect of the excludable time provisions of Mass. R. Crim. P. 36(b), e.g., whether time should be excluded from the speedy trial limits due to the absence of an essential witness and, if so, how much. Mass. R. Crim. P. 36(b)(2)(B).

The 2004 revision eliminated a provision then numbered (a)(1)(C), which required the defendant to reveal "the nature of the defense" at the pretrial conference, and whether he or she intends to defend by alibi, insanity or privilege. Such discovery to the prosecution is now mandatory discovery under Rule 14, at a more realistic and constitutionally appropriate phase of the pretrial proceedings. The pretrial conference is generally held too

early to expect the defendant to know and convey the defense, especially since full discovery may not yet have been provided by the prosecution. Indeed, because under the Fifth and Fourteenth Amendments to the United States Constitution the defense can only be compelled to disclose information it has decided to use at trial, *Williams v. Florida*, 399 U.S. 78 (1970), prosecutorial discovery should not be required before the defendant is in a position to make an informed decision.

Subdivision (a)(2)(A) outlines the contents of the pretrial conference report and establishes the requirement that it be signed by the defendant when it contains agreements which amount to waivers of constitutional right or stipulations to material facts. The defendant's signature should not be pro forma, but should be subscribed only after his counsel has explained the consequences of this act to him. To expedite this procedure, subdivisions (a) and (b) mandate that the defendant "shall be available for attendance" at both the pretrial conference and the pretrial hearing. This requirement assures also that the defendant's assent to other agreements may readily be obtained.

The pretrial conference report must set out all agreements of the parties. Such agreements have the force of a court order, and are enforceable by the same sanctions.

*Commonwealth v. Viriyahiranpaiboon*, 412 Mass. 224, 228 (1992); *Commonwealth v. Durning*, supra at 495; *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 (1987); *Commonwealth v. Chapee*, 397 Mass. 508, 517 (1986), habeas denied sub nom. *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988); *Commonwealth v. Delaney*, 11 Mass. App. Ct. 398 (1981). Only pretrial motions whose subject matter could not be agreed on at the conference may be filed. The conference report is filed with the clerk, whose responsibility it is to monitor filing and advancement of cases for trial.

Subdivision (a)(2)(B) sets out the sanctions to be imposed upon a failure to file a report and to appear to explain that failure. If counsel refuse to cooperate in the conference procedure, the court may also invoke its authority under subdivision (a)(1) to require a conference be held at court under the supervision of a judge or clerk-magistrate.

## Subdivision (b)

The pretrial hearing. This subdivision originally concerned conference procedures in the District Court jury-waived sessions. By a 2004 amendment, Rule 11(a)'s pretrial conference requirements were made uniform for all sessions, and subdivision (b) is instead devoted to the pretrial hearing. New subdivision 11(b) allows a District Court judge to decline jurisdiction and schedule a probable cause hearing expeditiously (and in such case the judge may entertain discovery motions prior to the probable cause hearing, *Commonwealth v. Silva*, 10 Mass. App. Ct. 784, 791 (1980)). Otherwise a pretrial hearing is

to be held in order to accomplish the pretrial matters enumerated in the subdivision. Subparagraph (b)(1) authorizes the court to receive a plea, admission, or other requested disposition. If there is no plea or disposition, subparagraph (b)(2)(i) requires the parties to file the pretrial conference report; (b)(2)(ii) requires the pretrial hearing judge to hear all pending discovery motions, and permits him or her to hear other pretrial motions as well; and (b)(2)(iii) requires the court to schedule the next court date. If the pretrial report or discovery is not complete, the court will schedule a compliance hearing unless waived by the aggrieved party (see subdivision (c)). If they are complete, the court will ask the defendant to elect or waive a jury trial, and then assign “the trial date or trial assignment date.” Ideally, the rule would have simply required the assignment of a trial date, rather than offering the option of scheduling a “trial assignment date,” which allows for yet another intermediate hearing date; but practical constraints require this option, as many courts are presently unable to guarantee a particular trial date as early as the pretrial hearing. Although the jury decision should be fully considered and resolved at this time, nothing in the rule prevents a defendant who elects a jury trial from waiving the right at a later date.

### Subdivision (c)

Compliance Hearing. This subdivision makes a compliance hearing mandatory if a party failed to complete a pretrial conference report or provide discovery, unless the aggrieved party waives such a hearing. Such a hearing was optional before this subdivision was promulgated in 2004, leading to routine inefficiencies this subdivision is designed to eliminate. In courts that did not have compliance hearings, the aggrieved party had confronted an unfair choice between the sometimes burdensome task of obtaining an expedited hearing simply to obtain overdue discovery, or waiting until the trial date to receive discovery (which itself presented the prospect of either a continuance or an immediate trial with unprepared counsel). Moreover, municipal and district courts without compliance hearings had to defer jury waivers until the trial date pursuant to G.L. c. 218, § 28, which prohibits a waiver decision until discovery has been delivered. It promoted delays and inconvenience to witnesses for the court to remain ignorant up to the trial date as to whether a jury session would be required.

Therefore, this subdivision requires a compliance hearing when required discovery has not been forthcoming, and limits the hearing to certain enumerated matters mostly derived from Dist./Mun. Cts. R. Crim. P. 5. The court must determine whether the pretrial report and discovery are complete; must hear and decide pending discovery motions; and may order sanctions for non-compliance. If discovery is completed, it may receive a plea or admission; obtain the defendant’s decision on whether to elect or waive a jury trial; and schedule the trial date or trial assignment date.

# Rule 12: Pleas and Withdrawals of Pleas

## (a) Pleas in General

### *(1) Pleas that may be entered and by whom*

A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18(b). Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

### *(2) Admission to Sufficient Facts*

In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

### *(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts*

A judge may accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts only after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts.

## (b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement

### *(1) In General*

The defendant may tender a guilty plea, a plea of nolo contendere, or an admission to sufficient facts to warrant a finding of guilty without entering into a plea agreement with the prosecutor. Alternatively, if the defendant intends to tender a plea of guilty or an admission to sufficient facts, the prosecutor and the defendant may enter into a plea agreement pursuant to Rule 12(b)(5).

## *(2) Plea Discussions*

The judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.

## *(3) Inquiry as to the Existence of a Plea Agreement*

After being informed that a defendant intends to plead guilty or to admit to sufficient facts, the judge shall inquire as to the existence of a plea agreement.

## *(4) Pleas Without an Agreement*

If the defendant intends to plead guilty or nolo contendere or to admit to sufficient facts and there is no agreement under Rule 12(b)(5), the judge shall follow the procedures set forth in Rule 12(c).

## *(5) Pleas Conditioned Upon an Agreement*

The defendant may enter into a plea agreement with the prosecutor if the defendant intends to plead guilty or admit to sufficient facts but not if the defendant intends to plead nolo contendere.

(A) A plea agreement may specify both that the parties agree on a specific disposition, including the length of any term of probation, and that the prosecutor will make one or more of the following charge concessions: amend an indictment or complaint; dismiss, reduce, or partially dismiss charges; not seek an indictment; or not bring other charges. The judge shall follow the procedures set forth in Rule 12(d) when the parties enter into a plea agreement that includes both an agreement to a specific disposition and a charge concession. If the judge accepts the plea agreement and the defendant's plea, Rule 12(d) requires the judge to sentence the defendant according to the terms of the plea agreement.

(B) When the plea is conditioned on a plea agreement other than one described in Rule 12(b)(5)(A), the judge shall follow the procedures set forth in Rule 12(c).

## *(6) Pleas Reserving Appellate Review*

With the written agreement of the prosecutor, the defendant may tender a plea of guilty or an admission to sufficient facts while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges. The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the ruling or rulings would render the Commonwealth's case not viable on one or more specified charges. The judge, in an exercise of discretion, may refuse

to accept a plea of guilty or an admission to sufficient facts reserving the right to appeal. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea or the admission to sufficient facts on any of the specified charges. If the defendant withdraws the guilty plea or the admission to sufficient facts, the judge shall dismiss the complaint or indictment on those charges, unless the prosecutor shows good cause to do otherwise. The appeal shall be governed by the Massachusetts Rules of Appellate Procedure, provided that a notice of appeal is filed within thirty days of the acceptance of the plea.

## (c) Procedure If No Plea Agreement or If Plea Agreement Does Not Include Both a Specific Disposition and a Charge Concession

### *(1) Disclosure of the Terms of Any Plea Agreement*

If the parties have entered into a plea agreement described in Rule 12(b)(5)(B), the parties shall disclose the terms of that agreement on the record in open court, including any factor, disposition, or action upon which the plea is conditioned, unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

### *(2) Tender of Plea*

The defendant's plea or admission shall be tendered to the judge.

### *(3) Colloquy*

The judge shall:

- (A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:
  - (i) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;
  - (ii) of the maximum possible sentence on the charge, and, if applicable,
    - (a) any different or additional punishment based upon subsequent offense provisions of the General Laws;
    - (b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;

- (c) the mandatory minimum sentence on the charge; and
  - (d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;
  - (iii) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere, or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.
- (B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.
- (C) Rights of victims and witnesses of crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. At any time prior to imposing sentence, the judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

#### *(4) Disposition Requests*

##### **(A) When there is no agreed-upon recommendation as to disposition**

The judge shall give both parties the opportunity to recommend a disposition to the judge. In the District Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the defendant's request without first giving the defendant the right to withdraw the plea. In the Superior Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the prosecutor's recommendation without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

##### **(B) Where there is an agreed-upon recommendation as to disposition**

The judge shall inform the defendant that the disposition imposed will not exceed the terms of the agreement without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an



opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

### *(5) Findings of judge; acceptance of plea*

The judge shall inquire whether the defendant still wishes to plead guilty or nolo contendere or admit to sufficient facts. If so, the judge will then make findings as to whether the plea or admission is knowing and voluntary, and whether there is an adequate factual basis for the charge. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

### *(6) Sentencing*

After acceptance of a plea of guilty or nolo contendere or an admission, the judge shall sentence the defendant.

#### *(A) Conditions of probation*

If the judge's disposition includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

#### *(B) Intent to impose sentence exceeding requested disposition*

In District Court, if the judge decides to impose a sentence that will exceed the defendant's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In Superior Court, if the judge decides to impose a sentence that will exceed the prosecutor's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In both District and Superior Court, the judge may indicate to the parties what sentence the judge would impose.

## (d) Procedure if plea agreement includes both a specific sentence and a charge concession

### *(1) Disclosure of the terms of the plea agreement*

The parties shall disclose the terms of the plea agreement on the record in open court, including any factor, disposition, or action upon which the plea is conditioned, unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

### *(2) Tender of plea*

The defendant's plea or admission shall be tendered to the judge.

### *(3) Colloquy*

The judge shall:

- (A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:
  - (i) that by a plea of guilty or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;
  - (ii) of the maximum possible sentence on the charge, and, if applicable,
    - (a) any different or additional punishment based upon subsequent offense provisions of the General Laws;
    - (b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;
    - (c) the mandatory minimum sentence on the charge; and
    - (d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;
  - (iii) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere, or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

- (B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.
- (C) Rights of victims and witnesses of crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. The judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

#### *(4) Review; acceptance or rejection of plea agreement*

The judge must accept or reject the plea agreement before the judge accepts a guilty plea or admission. The judge should not accept a plea agreement without considering whether the proposed disposition is just. At any time prior to the acceptance or rejection of the plea agreement, the judge may continue the plea hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination whether the plea agreement provides for a just disposition in the case.

##### *(A) Accepted plea agreement*

If the judge accepts the plea agreement, the judge shall inform the defendant that the judge will impose the sentence, including the length of any term of probation, provided in the plea agreement.

##### *(B) Rejected plea agreement*

If the judge rejects the plea agreement, the judge shall, on the record and in open court (or, for good cause, in camera on the record):

- (i) inform the parties that the judge rejects the plea agreement, but the judge may indicate to the parties what sentence the judge would impose or what additional information the judge will require before the judge may make this determination;
- (ii) allow either party to withdraw from the plea agreement; and
- (iii) allow the defendant to withdraw his or her plea or admission.

#### *(5) Findings of judge as to plea agreement and plea; acceptance of plea*

If the judge has accepted the plea agreement, the judge shall inquire whether the defendant still wishes to plead guilty or admit to sufficient facts. If so, the judge will then make findings as to whether the plea agreement and plea or admission are knowing, voluntary, and supported by an adequate factual basis. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a

guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

## *(6) Sentencing*

After accepting the plea agreement and the plea or admission, the judge shall impose sentence according to the terms of the plea agreement. If the plea agreement includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

## **(e) Availability of criminal record and presentence report**

Prior to sentencing under Rule 12(c)(6) or to the judge's decision to accept or reject a plea agreement under Rule 12(d)(4), the judge, prosecutor, and counsel for the defendant shall have an opportunity to review the defendant's criminal record and any report of the presentence investigation as described in Rule 28(d)(2). In extraordinary cases, the judge may except from disclosure to the parties parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

## **(f) Inadmissibility of pleas, offers of pleas, and related statements**

Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a

criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.

## Rule History

*Amended June 12, 1986, effective January 1, 1987; amended March 8, 2004, effective September 7, 2004; amended January 29, 2015, effective May 11, 2015; amended July 17, 2019, effective September 1, 2019; amended July 23, 2020, effective September 1, 2020; amended February 22, 2022, effective April 1, 2022; amended September 3, 2025, effective November 1, 2025.*

## Reporter's Notes

### (2025)

This change to Rules 12(c) and 12(d) implements the disclosure requirements set forth in *Commonwealth v. DiBenedetto*, 491 Mass. 390, 405-407 (2023) so that a judge presented with a plea can determine whether it is voluntary. Because a plea waives constitutional rights, due process requires that it be voluntary, knowing, and made with sufficient awareness of the relevant circumstances and with the advice of competent counsel. *Brady v. United States*, 397 U.S. 742, 748, 758 (1970); *Commonwealth v. Roberts*, 472 Mass. 355, 362 (2015).

The plea judge must determine that any plea, and any plea agreement, is voluntary. See Rules 12(a)(3), 12(c)(5), and 12(d)(5). The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. *Brady*, 397 U.S. at 749. The parties must therefore disclose to the plea judge any factor, disposition, or action on which the plea or plea agreement is conditioned so the judge can ascertain voluntariness.

"A plea is voluntary if entered without coercion, duress, or improper inducements." *Commonwealth v. Berrios*, 447 Mass. 701, 708 (2006). A plea is not involuntary, however, because a defendant faced pressure from considering a possible conviction at trial or subsequent sentence even for serious charges. *Id.*, 447 Mass. at 709 (Plea motivated by defendant's conclusion that he had no choice other than to plead guilty was not thereby involuntary but "endemic to any system which asks a person to forgo certain rights in order to be spared certain penalties."). Even such pressure from third parties such as counsel or family members does not necessarily render a plea involuntary. *Commonwealth v. Quinones*, 414 Mass. 423, 427-428 (1993) (Defendant's plea to second degree murder was not involuntary despite being motivated by discussions with counsel and his family members who feared his conviction of first degree murder); *Commonwealth v. Furr*, 454

Mass. 101, 111-112 (2009) (Defendant's plea as youthful offender was not involuntary even if motivated by counsel and defendant's adult brothers warning him that he could face a life sentence at trial because this "does not rise to the level of improper coercion.").

Certain situations present particular risks of undue coercion or improper inducement. These include plea agreements in cases involving multiple defendants in which the agreement is conditioned on all defendants accepting the agreement ("package deal" plea agreements). The potential for involuntariness in "package deals" may arise either from coercion or improper inducement. A defendant may be coerced to enter a plea by pressure from a codefendant who seeks to obtain their own favorable disposition, as the benefits of a package deal may not accrue equally to all the defendants. *United States v. Hodge*, 412 F.3d 479, 489 (3rd Cir. 2005). A defendant may be improperly induced to enter a plea to obtain a favorable disposition for a codefendant. *Commonwealth v. Bolduc*, 375 Mass. 530, 533, 536-537 (1978) (Acknowledging consideration of reduced sentences for codefendants "certainly places some pressure on a defendant" but finding defendant's plea nevertheless voluntary where there was no agreement conditioned on defendant's plea.). These risks are heightened when the codefendant is a family member or close personal friend. *United States v. Mescual-Cruz*, 387 F.3d 1, 7-8 (1st Cir. 2004), cert. denied, 542 U.S. 1175 and 543 U.S. 1176 (2005).

To address these risks, whenever a plea or plea agreement is conditioned on the acceptance of more than one defendant, the plea judge must be made aware of this condition. *DiBenedetto*, 491 Mass. at 406. Awareness of these circumstances enables the plea judge "to conduct a real probe of the defendant's mind to determine that the plea is not being extracted from the defendant under undue pressure." *Commonwealth v. Foster*, 368 Mass. 100, 107 (1975) (internal quotations omitted). The judge must inquire with special care into the voluntariness of the plea and consider in addition to the traditional forms of coercion the "unique pressure from a codefendant or family member that might be present in a package deal." *Id.*, 491 Mass. at 407. If the Commonwealth does not fully inform the plea judge of the nature of this condition, the defendant must be allowed to withdraw their plea. *DiBenedetto*, *Id.*

The risks of undue coercion or improper influence are not limited to package deals involving pleas. A defendant could be coerced or improperly induced to enter a plea to avoid a third party being charged or to obtain dismissal of charges against a third party. While a guilty plea is not invalid because it is entered in response to a promise of favorable treatment for a third party, this circumstance can affect whether it is voluntary. *Commonwealth v. Balliro*, 370 Mass. 585, 589-590 (1976) (Recognizing challenges to pleas involving lenient treatment for family members but upholding defendant's plea in exchange

for favorable recommendation on sentencing codefendants as voluntary). Such circumstances must therefore be disclosed to the judge considering the plea or plea agreement.

## (2022)

These amendments to Rule 12(b)(5)(A), Rule 12(c)(4), and to the heading of Rule 12(c), implement the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020), to reflect more accurately that potential outcomes in criminal cases may include continuances without a finding or other non-conviction dispositions. *Id.*, 485 Mass. at 8-9 (noting uses of both “sentence” and “disposition” in the rule).

## (2020)

In *Commonwealth v. Petit-Homme*, 482 Mass. 775 (2019) the SJC referred to the Committee for review and reconsideration the immigration warning judges are required to give as part of plea colloquies or admissions to sufficient facts by Mass. R. Crim. P. 12(c)(3)(A)(iii)(b) and 12(d)(3)(A)(iii)(b) (the “rule [b] warning”). This warning (which is identical in both sections of the rule) is one of two that judges must give concerning potential immigration consequences of a guilty plea or admission.

The other warning, prescribed by General Laws c. 278, § 29D, is set forth in Mass. R. Crim. P. 12(c)(3)(A)(iii)(a) and 12(d)(3)(A)(iii)(a) (the “rule (a) warning”). It provides a general advisory that persons who are not citizens of the United States may face consequences under federal law of deportation, exclusion from admission or denial of naturalization, by the court’s acceptance of their guilty plea, plea of *nolo contendere* or admission to sufficient facts.

In contrast to the general advisory in the rule (a) warning, the rule (b) warning provides a more specific advisory about the likelihood of the immigration consequences described in the rule (a) warning based on treatment under federal law of the offenses to which a defendant pleads guilty or makes an admission. Unlike the general advisory in the rule (a) warning, the accuracy of this warning depends on “a thorough, nuanced understanding of Federal immigration law,” as well as detailed information concerning “the defendant’s immigration history and status, criminal record, and the nature and circumstances of the pending charges.” *Petit-Homme*, 482 Mass. at 786.

Without this detailed understanding of Federal immigration law, and the defendant’s immigration and criminal history, this more specific warning may create a misimpression or misunderstanding among defendants, and when paired with the more general advisory

creates a significant risk of confusion. For these reasons, the rule (b) warning was eliminated in this amendment.

Eliminating this warning in no way reduces counsel's obligation to assess the potential collateral consequences for a non-citizen defendant of a guilty plea, plea of nolo contendere or admission to sufficient facts. See *Padilla v. Kentucky*, 559 U.S. 356, 363-364 (2010); *Commonwealth v. DeJesus*, 468 Mass. 174, 182 (2014); *Commonwealth v. Clarke*, 460 Mass. 30, 48 n. 20 (2011), partially abrogated on other grounds by, *Chaidez v. United States*, 568 U.S. 342 (2013) ("receipt of such warnings is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea").

Standards of practice for representation require counsel to consider potential immigration consequences for a client throughout a case. Committee for Public Counsel Services, *Performance Standards Governing Representation of Indigents in Criminal Cases* §2.a.v. (Preliminary Proceedings & Preparation—Arraignment) (in rare circumstances when it may be appropriate to take advantage of an early disposition, especially one not involving a criminal record, counsel should be aware of potential immigration consequences of a continuance without a finding); §§5.d.vi. and xiii. (Dispositions by Plea or Admission—Consequences of Conviction) ("Counsel must advise client, prior to any change of plea, of the consequences of conviction, including: . . . consequences for non-citizens; and possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States."); §7.a.vii. (Sentencing—Preparation) ("Defense counsel should be familiar with and consider: . . . collateral consequences of any sentence, including immigration consequences"). These standards apply equally to representation of juveniles. *Performance Standards Governing Representation of Juveniles in Delinquency and Youthful Offender Cases* §2.a.vi.(a) (Preliminary Proceedings—Arraignment); §§ 6.d.vi. and xviii. (Disposition by Plea or Admission); and §8.a.vi. (Sentencing), January 1, 2019, version 1.9, Assigned Counsel Manual. See also, Jennifer Klein, *Consequences of Criminal Convictions for the Noncitizen*, Immigration Practice Manual, 3d Ed. § 19-1 (2017) ("A criminal defense lawyer must determine the immigration status of the defendant at the beginning of representation.").

## 2020 Statement of Opposition to the Adoption of Revised Mass. R. Crim. P. 12

**Lenk, J.** Apart from changing the current Rule 12 of the Massachusetts Rules of Criminal Procedure to require that plea discussions with a judge be on the record, I am not persuaded that further, let alone extensive, revision to the rule is necessary or desirable. As then Justice Herbert P. Wilkins wrote in 1991, "I decline to join in the promulgation of a rule



that apparently is intended to deal with a problem that is not shown to exist." Statement of Opposition to the Adoption of Revised Supreme Judicial Court Rule 3:07, DR 7-108(D), August 26, 1991.

The key impetus for changing Rule 12 stems from our decisions in *Commonwealth v. Rodriguez*, 461 Mass. 256 (2012) and *Commonwealth v. Dean-Ganek*, 461 Mass. 305 (2012), "holding that former Rule 12 permitted a judge to impose a sentence more lenient than the sentence agreed to in a plea agreement accepted by the judge . . . [and that] jeopardy attaches when the judge accepts the plea . . . thus preventing the prosecution's withdrawal in such a case, even when the plea agreement included negotiated charge concessions." Reporter's Notes to Proposed Rule 12(b) - (e) of the Massachusetts Rules of Criminal Procedure. Apart from continuing to think both that these cases were correctly decided and that the current Rule 12 embodies highly desirable judicial discretion, I am unaware of any instance in which a judge has accepted a plea in the context of a charge concession and then imposed a sentence more lenient than that jointly recommended in a plea agreement.

The current rule has worked quite well for quite some time, and has the not inconsiderable virtue of being familiar to bench and bar. Although the rule as changed is narrower than earlier proposed versions and Rule 29 remains unchanged, it is still a solution in search of a problem. To the extent that the adopted Rule 12 seeks to circumscribe the exercise of judicial discretion, even in limited circumstances, it is misguided and most unfortunate.

Chief Justice Gants and Justice Hines have authorized me to say that they join in this statement.

## **(2019)**

Subdivision (b)(6) is added in response to a referral in *Commonwealth v. Gomez*, 480 Mass. 240 (2018), requesting that the Committee propose a rule providing for conditional guilty pleas in Massachusetts. Like the federal rules and the rules of many states, it enables a defendant to enter a plea reserving a right to appeal (commonly called a "conditional plea"). Under this rule, a defendant may, with the prosecutor's agreement, plead guilty (or in District or Juvenile Courts admit to sufficient facts), appeal a ruling the defendant believes is erroneous and, if successful on appeal, withdraw the plea (or the admission to sufficient facts) and presumptively obtain dismissal of the charge. A guilty plea or admission to sufficient facts reserving appellate review of a specified ruling or rulings may be tendered under either Mass. R. Crim. P. 12(c) or 12(d). In all respects other than reserving the right to appeal, this subdivision works no change in existing rules governing pleas, sentencing, or appeal.

A guilty plea, voluntarily and intelligently made, ordinarily “waives all nonjurisdictional defects.” *Commonwealth v. Cabrera*, 449 Mass. 825, 830 (2007) (citing *Garvin v. Commonwealth*, 351 Mass. 661, 663-664 (1967)). Adverse rulings thus cannot be appealed, even by a defendant who might otherwise plead guilty, without the time and expense of a trial. As the Supreme Judicial Court recognized in *Commonwealth v. Gomez*, 480 Mass. 240 (2018), the Federal Rules of Criminal Procedure and the law of most states permit defendants to enter a guilty plea conditioned on the right to appeal a specified ruling of the court. See, e.g., Fed. R. Crim. P. 11(a)(2). In *Gomez*, the Court exercised its superintendence authority under G.L. c. 211, § 3 to authorize conditional guilty pleas provided the Commonwealth and the court agreed, and the defendant specified the ruling on which appellate review was sought. *Gomez*, supra at 252. This subdivision implements *Gomez* by permitting guilty pleas or admissions to sufficient facts in which the defendant reserves for appellate review one or more rulings.

This procedure facilitates plea bargaining and conserves judicial resources. These savings are greatest when the rulings reserved for appeal effectively dispose of the case; thus, the procedure requires that the Commonwealth agree that reversal of the ruling subject to appeal would render its case on the specified charge or charges not viable. While most conditional pleas involve legally dispositive rulings, even certain non-dispositive rulings can be subject to conditional pleas. See *Gomez*, 480 Mass. at 252. The rule thus extends to situations in which, should the reserved ruling be reversed, the Commonwealth would choose not to proceed because the case would no longer be viable for prosecution. The viability standard also appears in S.J.C. Order regarding Applications to a Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2) (June 8, 2016) (applications for interlocutory appeal by the Commonwealth must include a “statement whether the Commonwealth has a viable case without the suppressed evidence, and the strength of that case, if viable”).

This rule requires the parties to specify, by written agreement, the ruling or rulings reserved for appeal, and the charge or charges that would presumptively be dismissed if the defendant prevails on appeal and chooses to withdraw the guilty plea or admission to sufficient facts. The ruling or rulings should be identified by stating the name of the motion or pleading ruled upon, the date of the ruling or rulings, and the judge who issued the ruling. The charge or charges should be identified by reference to the complaint and offense or count of the indictment. The written agreement should be filed with the court and become part of the record for appeal. A guilty plea or admission to sufficient facts reserving appellate review of a specified ruling or rulings may be tendered under either Mass. R. Crim. P. 12(c) or 12(d). As with any guilty plea, the judge has discretion to refuse to accept a plea reserving appellate review. See Mass. R. Crim. P. 12(a)(3). While a plea that does not result in a conviction would ordinarily not merit appeal, in special circumstances

the collateral consequences of even a continuance without a finding may warrant a defendant pursuing an appeal. See, e.g., *Commonwealth v. Henry*, 88 Mass. App. Ct. 446 (2015) (admission to sufficient facts and continuance without a finding equivalent to a guilty plea in evaluating immigration consequences, citing *Commonwealth v. Grannum*, 457 Mass. 128, 130 n. 4 (2010)); *Burke v. Bd. of Appeal on Motor Vehicle Liability Policies and Bonds*, 90 Mass. App. Ct. 203, rev. denied 476 Mass. 1101 (2016) (admission to sufficient facts in connection with continuance without a finding on first offense operating under the influence could qualify as a conviction for purposes of lifetime revocation of driver's license pursuant to G.L. c. 90 § 24(1)(d)). The process for taking appellate review of the specified ruling or rulings is governed by the Massachusetts Rules of Appellate Procedure, provided that the notice of appeal is filed within thirty days of the acceptance of the plea.

If the defendant prevails in whole or in part on appeal, the defendant has the choice whether to withdraw the guilty plea, or the admission to sufficient facts, on the specified charge or charges. If the defendant elects to withdraw the plea or admission, dismissal of the specified charge or charges, which the Commonwealth previously agreed would not be viable should the defendant prevail on appeal, is presumptively appropriate. In cases in which, for example, the defendant prevails on appeal in part (e.g., the appellate court suppresses some but not all the evidence which the defendant sought to exclude), the Commonwealth has an opportunity to show good cause that the court should not dismiss the charge or charges. If the judge does not intend to dismiss the specified charge or charges, the judge should indicate that intention to the defendant before the defendant withdraws the guilty plea or admission to sufficient facts.

Appellate relief for the defendant may necessitate re-sentencing. As when a conviction or sentencing provision is vacated, in the normal course the trial judge has an opportunity to reassess the sentence given the remaining convictions and sentencing options.

*Commonwealth v. Sallop*, 472 Mass. 568, 570 (2015); *Commonwealth v. Kruah*, 47 Mass. App. Ct. 341, 348 (1999); *Commonwealth v. Clermy*, 37 Mass. App. Ct. 774, 779, *aff'd*, 421 Mass. 325 (1995).

### *(January 2015: Rule 12 Pleas and Plea Agreements)*

As the title of Rule 12 suggests, the 2015 revision of the rule resulted in a more carefully delineated and somewhat expanded role for plea agreements in the process of a judge's consideration and acceptance of a proffered guilty plea. The rule's amendment was in response to the Supreme Judicial Court's interpretation of Rule 12 in *Commonwealth v. Rodriguez*, 461 Mass. 256 (2012), and *Commonwealth v. Dean-Ganek*, 461 Mass. 305 (2012), holding that former Rule 12 permitted a judge to impose a sentence more lenient

than the sentence agreed to in a plea agreement accepted by the judge. The Court further held that jeopardy attaches when the judge accepts a plea, see *Dean-Ganek*, 461 Mass. at 312-313, thus preventing the prosecution's withdrawal in such a case, even when the plea agreement included negotiated charge concessions.

As amended, Rule 12 provides that, if (1) the parties enter a plea agreement which includes both a specific, agreed sentence and a prosecutorial charge concession and (2) the judge accepts that agreement, then the judge is bound to impose the agreed sentence. If, on the other hand, the judge rejects such an agreement, either party may withdraw. In all other pleas or admissions, whether conditioned on a plea agreement or not, the amended rule provides that the judge is not bound by the sentencing recommendations of the parties. However, in such cases, the amended rule permits the defendant to withdraw the plea if the judge indicates an intent to impose a sentence more severe than (1) an agreed recommendation (but without charge concessions), (2) the prosecutor's recommendation if there is no agreed sentencing recommendation, or (3) in District Court, the disposition requested by the defendant. Finally, in order to promote fair and efficient plea bargaining and to establish rules to govern the previously unregulated and widely varying practice of lobby conferences, amended Rule 12 provides for judicial participation in plea negotiations at the request of a party and requires that plea discussions with judicial participation be recorded.

## Rule 12(a) Pleas in General

The 2015 amendments made no substantive changes to Rule 12(a). The only changes were stylistic, designed to make the rule more specific and clear.

## Rule 12(b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement

### ***Rule 12(b)(1) In General***

Rule 12(b)(1) makes it clear that the defendant may tender a guilty plea, a *nolo contendere* plea, or, in District Court, an admission to sufficient facts, without entering into a plea agreement. See Rule 2(b)(7) (defining "District Court" to include all divisions of the District Court, Boston Municipal Court, and Juvenile Court). However, the rule also provides that the parties may condition a guilty plea (or, in District Court, an admission to sufficient facts) on a plea agreement under Rule 12(b)(5), discussed below. Rule 12(b)(1) omits *nolo contendere* pleas from those that can be conditioned on a plea agreement, an omission that Rule 12(b)(5) makes explicit, thus limiting the benefits of a plea agreement to those defendants who take responsibility for the crimes to which they are pleading.

### ***Rule 12(b)(2) Plea Discussions***

Rule 12(b)(2) provides that the judge may participate in plea discussions at the request of either party provided that any such discussions are recorded and made part of the record. Such limited judicial participation in plea negotiations facilitates fair and efficient case management, particularly in courts with crowded dockets, and it has been a longstanding though largely unregulated practice in many courts. The rule maintains the recognized benefits of this practice while providing important safeguards to curb its potential for abuse.

Recognizing that judicial participation in plea negotiations can be coercive and leave the impression of unfairness, this provision addresses these concerns by conditioning such participation on the request of one or both parties and further requiring that these discussions be recorded and made a part of the record. See *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 57 n. 15 (2007) (stressing the importance of recording lobby conferences). The rule does not, however, preclude a judge's uninvited announcement that he or she is willing to participate in plea discussions if invited to do so by either party. The rule's requirement that the discussions be recorded and made part of the record is not meant to require that they invariably be conducted in open court. As with other potentially sensitive matters, judges have discretion under the appropriate circumstances to conduct plea discussions in a manner that restricts immediate public access, most likely at sidebar, provided they are recorded. Judges are experienced in determining when sidebars or other such restrictions are appropriate, and the rule anticipates that they will continue to apply that experience in judiciously exercising this discretion.

### ***Rule 12(b)(3) Inquiry as to the Existence of a Plea Agreement***

Rule 12(b)(3) provides that, when a defendant indicates an intent to plead guilty or to admit to sufficient facts, the judge shall inquire if there is a plea agreement. Because plea procedures vary depending on whether there is an agreement that will bind the judge if accepted, such an inquiry is necessary in order to determine which procedure is applicable. Because Rule 12 does not permit a nolo contendere plea to be conditioned on a plea agreement, the rule does not require the judge to ask if there is a plea agreement in such a case. However, it may make sense for the judge nevertheless to make this preliminary inquiry in the case of a nolo plea, if only to ensure that the parties understand that any such plea agreement is outside the rule, constituting at best a joint recommendation that the judge is free to disregard.

### ***Rule 12(b)(4) Pleas Without an Agreement***

If there is no plea agreement under Rule 12(b)(5), Rule 12(b)(4) provides that the procedure for taking a plea or admission set forth in Rule 12(c) applies. In such a case, the parties are each free to make any dispositional request permitted by law.

### ***Rule 12(b)(5) Pleas Conditioned Upon an Agreement***

Rule 12(b)(5) provides that a defendant may condition an intended guilty plea or admission on a plea agreement with the prosecutor. As noted, the rule explicitly precludes a plea agreement if the intended plea is *nolo contendere*. The rule divides plea agreements into two categories. Rule 12(b)(5)(A) provides for a type of plea agreement that, if accepted by the judge, binds the judge to sentence in accordance with the agreement, and Rule 12(b)(5)(B) provides, in effect, that no other plea agreement binds the judge to impose a particular sentence.

Under Rule 12(b)(5)(A), an accepted plea agreement will bind the judge if the parties have agreed both to a particular charge concession(s) by the prosecutor and to a specific sentence, including the length of any probationary term. Rule 12(b)(5)(A)'s reach is intentionally narrow. The rule carves out an exception to judicial sentencing discretion, an exception applicable only to a plea bargain that expressly includes both a prosecutorial charge concession and an agreed sentence to a specific term of incarceration, to a specific period of probation, or to a specific term of incarceration coupled with a specific period of probation (e.g., a term of probation to be served in lieu of a suspended sentence of incarceration, or a term of probation to be served on and after a term of incarceration). If the parties enter into such an agreement, the rule requires the judge to follow the plea procedures set forth in Rule 12(d), noting that those procedures mandate imposition of the agreed sentence if the judge accepts the plea agreement and the plea. See Rule 12(d)(4)(A) and (6), discussed below. As discussed below, Rule 12(d) further provides that, if the judge rejects such a plea agreement, either party may withdraw from the agreement and thus from the plea. See Rule 12(d)(4)(B).

Even though Rule 12(b)(5)(A) permits the parties to include a specific period of probation within a binding plea agreement, the rule does not permit the parties to bind the judge to impose specific conditions of probation. Any agreement by the parties concerning conditions of probation is treated as a non-binding recommendation for the judge to consider, with the assistance of probation, in deciding what probationary conditions are appropriate in the case. See Rule 12(d)(6), discussed below. Finally, nothing in Rule 12 is intended to limit a judge's lawful discretion to modify probationary conditions during the course of probation or to adjust the probationary term upon a finding of a probation violation. In short, a plea agreement containing a charge concession and an agreed-upon

period of probation will bind a judge who accepts that agreement to impose the agreed term of probation, but the parties may not by agreement trench upon the longstanding prerogative of the judge to determine and subsequently to modify any conditions of probation during that probationary term. See *Commonwealth v. Goodwin*, 458 Mass. 11, 17-19 (2010).

Under Rule 12(b)(5)(B), pleas conditioned on plea agreements other than those described in Rule 12(b)(5)(A) are governed by the procedures set forth in Rule 12(c), the procedures that also govern pleas in which there is no plea agreement. As discussed below, Rule 12(c) treats any agreement contained in a Rule 12(b)(5)(B) plea agreement as a non-binding, joint recommendation. For example, if the parties agree to a specific sentence unaccompanied by a charge concession, to a charge concession unaccompanied by an agreement to a specific sentence, or to some other dispositional alternative such as incarceration in a particular facility, that agreement would not bind the judge in imposing sentence. As was true under former Rule 12(b), the parties are free to enter into an agreement to recommend any disposition, or kind of disposition, permitted by law in the case in question. However, unless the agreement provides for both a charge concession and a specific sentence, the judge cannot be bound to follow that recommendation.

## **Rule 12(c) Procedure If No Plea Agreement or If Plea Agreement Does Not Include Both a Specific Sentence and a Charge Concession**

Rule 12(c) provides for the plea procedure in cases in which the parties have not entered a binding plea agreement under Rule 12(b)(5)(A). Rule 12(c)'s procedure is parallel to that set forth in Rule 12(d), which is applicable to pleas and admissions when there is a Rule 12(b)(5)(A) binding plea agreement. The two sections diverge in their respective timing of receipt of victim impact statements, compare Rule 12(c)(3)(C) with Rule 12(d)(3)(C), treatment of the parties' sentencing recommendations, compare Rule 12(c)(4) with Rule 12(d)(4), and sentencing, compare Rule 12(c)(6) with Rule 12(d)(6). Otherwise, the two plea procedures are substantively identical.

### ***Rule 12(c)(1) Disclosure of Terms of Plea Agreement***

As discussed above, if the plea is conditioned on a plea agreement, the applicability of Rule 12(c)'s procedures depends on the provisions of that agreement. If the agreement provides for both a prosecutorial charge concession and an agreed specific sentence, the procedures under Rule 12(d) apply; if not, Rule 12(c) applies. It is thus important for the parties and the judge to be clear about the terms of any agreement before the plea procedure begins.

### ***Rule 12(c)(2) Tender of Plea***

Because Rule 12(c) applies to pleas in which there is no agreement as well as to pleas conditioned on an agreement, Rule 12(c)(2) moves the tender of plea or admission to the beginning of the plea procedure so that from the outset the terms of the plea or admission are clear even if there is no agreement. Although the plea tender precedes Rule 12(c)(3)'s colloquy, which includes the notice of the consequences of the plea, Rule 12(c)(5) permits the defendant to withdraw the tendered plea or admission subsequent to the colloquy but prior to the judge's acceptance of the plea or admission. In a District-Court plea in which there will be a recommendation of probation, whether unagreed or agreed, the party(ies) must consult with the probation department before tendering the plea so that probation will be in a position to provide any assistance that the judge may require in sentencing. See Dist./Mun. Ct. R. Crim. P. 4(c).

### ***Rule 12(c)(3) Colloquy***

Rule 12(c)(3)(A) requires the judge to begin the plea colloquy by notifying the defendant of the consequences of the tendered plea or admission. The notice of consequences is substantively identical to former Rule 12(c)(3)'s required notice of consequences with two exceptions. First, unlike its predecessor, Rule 12(c)(3)(A)(ii)(d) requires the notice mandated by the 2012 amendments to the habitual-offender statute. See G.L. c. 279, § 25(d) (requiring notice of potential habitual-offender consequences "prior to accepting a guilty plea for any qualifying offense listed in subsection (b) [of the statute]" but further providing that the failure to give such notice is not a basis to vacate an otherwise valid plea or conviction).

Second, Rule 12(c)(3)(A)(iii) expands former Rule 12(c)(3)(C)'s required noncitizen warning. As did former Rule 12(c)(3)(C), Rule 12(c)(3)(A)(iii)(a) requires the warning mandated by G.L. c. 278, § 29D, advising a defendant that, if he or she is a noncitizen, his or her plea or admission may result in deportation, exclusion from admission, or denial of naturalization. Rule 12(c)(3)(A)(iii)(b) advises further that, if (1) the offense to which the defendant is pleading is under federal law one that "presumptively mandates removal from the United States" (a so-called "removable offense," see *Padilla v. Kentucky*, 559 U.S. 356, 363-364 (2010)) and (2) federal officials seek removal, it is "practically inevitable that [defendant's] conviction would result in deportation, exclusion from admission, or denial of naturalization."

This additional warning recognizes that under federal immigration law there are a substantial number of crimes—including "all controlled substances convictions except for the most trivial of marijuana possession offenses," see *Padilla*, 559 U.S. at 368; 8 U.S.C. § 1227(a)(2)(B)(i) (2008)—the conviction for which make "deportation practically inevitable" if



federal officials seek the defendant's removal. See *Commonwealth v. DeJesus*, 468 Mass. 174, 181 & n. 5 (2014). See also *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013) (cited in *DeJesus*, noting that the federal Immigration and Nationality Act prohibits discretionary relief for deportations based on convictions for a wide range of crimes no matter how compelling the circumstances). Further, as the warning states, once deported due to such a conviction, a defendant would almost certainly be denied both re-admission to the United States and naturalization. See, e.g., L. Rosenberg, D. Kanstroom & J. Smith, *Immigration Consequences of Criminal Proceedings*, Massachusetts Criminal Practice § 42.2 (E. Blumenson & A. Leavens eds., 4th ed. 2012). It is important to appreciate that Rule 12(c)(3)(A)(iii)(b)'s warning is limited to the consequences of a conviction for a "removable offense." The narrow focus of this enhanced warning is purposeful and should not be read to suggest that convictions for other crimes would have no serious immigration consequences. Under federal law, conviction for—or even an admission to conduct constituting—a broader range of crimes than those presumptively mandating removal can also result in denial of re-admission and of naturalization. *Id.* §§ 42.2- 42.3.

Finally, as Rule 12(c)(3)(A)(iii)'s warning provides, under federal immigration law, "convictions" include admissions to sufficient facts even when the result is a continuance without a finding (CWO), if the continuance is conditioned on "some form of punishment, penalty or restraint" such as payment of costs or restitution. See *DeVaga v. Gonzalez*, 503 F.3d 45, 49 (1st Cir. 2007) (holding that a CWO conditioned on payment of restitution satisfies 8 U.S.C. § 1101(a)(48)(A)(ii)'s provision that an admission to sufficient facts constitutes a "conviction" if the admission results in "some form of punishment, penalty or restraint"); *Matter of Cabrera*, 24 I. & N. Dec. 459, 462 (BIA 2008) (holding that imposition of costs and surcharges following a plea is a "penalty" or "punishment" for purposes of § 1101(a)(48)(A)(ii)).

This noncitizen warning is not meant to displace the critical role of counsel in providing more particular advice concerning the immigration consequences of a particular plea. Quite the contrary, the warning is meant to trigger that advice if, under circumstances best known by counsel, a defendant is risking serious immigration consequences by pleading guilty or admitting to sufficient facts. See *Padilla v. Kentucky*, 559 U.S. 356, 368-369 (2010); *Commonwealth v. Clarke*, 460 Mass. 30, 45-46, 48-49 & n. 20 (2011) (noting that then-Rule 12's requirement of "[immigration] warnings is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea"), partially abrogated on other grounds, *Chaidez v. United States*, 133 S. Ct. 1103 (2013); *DeJesus*, 468 Mass. at 182 (holding that counsel's advice to a noncitizen defendant that he would be "eligible for deportation" and would "face deportation" if he pled guilty to possession of cocaine with

intent to distribute ( a removable offense under the immigration statute) was constitutionally inadequate).

Rule 12(c)(3)(B) requires the prosecutor to present the factual basis of the charge. Unlike former Rule 12(c)(5)(A), Rule 12(c)(3)(B) does not exclude nolo contendere pleas from the requirement that the prosecutor present a factual basis for the tendered plea or admission. The factual basis of a nolo plea provides information essential to crafting an appropriate sentence, but, because the defendant is not called upon to acknowledge or admit those facts, they will not be admissible in any subsequent proceeding against the defendant. See, e.g., Mass. Guide to Evidence § 803(22) (2014) (explicitly excluding judgments based on nolo contendere pleas from the hearsay exception generally applicable to judgments of conviction).

The prosecutor can present the factual basis in the traditional manner, stating the facts that he or she expects to prove if the case goes to trial, but the rule also permits presenting sworn testimony, at the request of the judge or otherwise, as a way to satisfy this requirement. If the plea is an Alford plea, i.e., one in which the defendant declines to admit one or more elements of the offense to which he or she is nevertheless pleading guilty, the Supreme Court requires “strong evidence of [the defendant’s] guilt.” See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). In such a case, the prosecutor should give particular attention to this testimonial option. See E. Cypher, *Procedure if Defendant pleads Guilty or Nolo Contendere but does not admit Participation in Crime*, 30A Mass. Prac., Criminal Practice & Procedure, § 24:78 n. 4 (2014) (“[I]f an Alford plea is offered, the Commonwealth should . . . [offer] sworn testimony to show the case is strong against the defendant, his defense is non-existent, and the defendant has presented reasons why the plea should be accepted”).

As the final part of the colloquy, Rule 12(c)(3)(C) requires the judge to inquire of the prosecutor as to compliance with G.L. c. 258B. However, the judge is granted discretion concerning when to hear any victim-impact statements. The judge does not need this input until deciding whether to accept or reject the plea and then to impose sentence. However, hearing victim-impact statements at this stage of the proceeding—just before hearing the parties’ respective sentencing recommendations and arguments—may provide the judge with the proper perspective for considering those recommendations and deciding what is a just disposition in the case.

### ***Rule 12(c)(4) Disposition Requests***

Rule 12(c)(4) gives the parties the opportunity to make their respective sentencing recommendations. This section has two subdivisions: Rule 12(c)(4)(A) applies to cases in which there is no agreed-upon sentence recommendation, and Rule 12(c)(4)(B) applies to

cases in which there is. Rule 12(c)(4)(A) requires a District Court judge to inform a defendant of the statutory right to withdraw the plea if the judge imposes a sentence that exceeds the defendant's request, see G.L. c. 278, § 18, and a Superior Court judge to inform a defendant of the right to withdraw the plea if the disposition imposed exceeds the prosecutor's recommendation. If the parties have agreed on a sentence recommendation, Rule 12(c)(4)(B) requires the judge to inform the defendant that the plea may be withdrawn if the sentence imposed exceeds the agreed-upon recommendation. However, unlike Rule 12(d)(4)(B)(ii), which applies to binding plea agreements, Rule 12(c)(4)(B) does not give the prosecution the right to withdraw from the plea agreement and the plea if the judge announces an intent to impose a sentence more lenient than the sentence jointly recommended.

If in considering the parties' joint or respective recommendations the judge decides that he or she needs more information or time to determine a just disposition in the case, both subsections of Rule 12(c)(4) allow the judge to continue the plea hearing for that purpose. Among the factors pertinent to the judge's sentencing decision are the nature of the offense committed, the manner in which it was committed, the impact that the offense had on any victims, the defendant's criminal history, and the defendant's circumstances (e.g., his or her mental health, substance abuse, and/or psychological issues). The judge, in consultation with probation where appropriate, should take the time and consider the facts necessary to craft a sentence, including any term and conditions of probation, that is fair, appropriate to the crime, and designed to diminish the risk of recidivism.

### ***Rule 12(c)(5) Findings of Judge; Acceptance of Plea***

Rule 12(c)(5) requires the judge to inquire if the defendant still wishes to plead guilty or admit to sufficient facts. At this point, the defendant has received the notice of consequences of the plea or admission, has heard the factual basis for the charged offense(s), and is aware of the respective sentencing recommendations of the parties. The defendant may have also heard the victim-impact statement(s), if any. The defendant must now elect to go forward with his or her tendered plea or admission, or choose to withdraw it and go to trial. If the defendant elects to go forward, the judge then makes the necessary inquiries to ensure that the plea or admission is knowing and voluntary. The amended rule is intended to make no change to former Rule 12(c)(5)'s provision for this voluntariness hearing, either in its form or substance.

The rule also requires the judge to find that there is an adequate factual basis for the plea or admission. As did its predecessor, Rule 12(c)(5) provides that the defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a

guilty plea. The rule is not intended to work any change to former Rule 12(c)(5)(A) in this regard.

If the judge is satisfied that the plea or admission is knowing, voluntary, and supported by an adequate factual basis, the judge is then in a position to accept the tendered plea or admission. Of course, if the judge is not satisfied in this regard, or, if for some other reason the judge determines that the plea or admission would not result in a just disposition of the case, the judge is permitted to reject the plea or admission. Nothing in the rule is meant to deprive the judge of this longstanding discretion. See *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982) (acceptance of a guilty plea is “wholly discretionary with the judge”), citing *Santobello v. New York*, 404 U.S. 257 (1971); E. Cypher, 30A Mass. Prac., Criminal Practice & Procedure, Judge may refuse to accept guilty plea, plea of nolo contendere or admission to sufficient facts, § 24:60 (4th ed. 2014).

### ***Rule 12(c)(6) Sentencing***

If the judge accepts the plea or admission, the judge then imposes sentence under Rule 12(c)(6). As required by G.L. c. 278, § 18, Rule 12(c)(6)(B) explicitly permits a District Court defendant to withdraw his or her tendered plea or admission if the intended sentence exceeds the defendant’s requested disposition. Similarly, in Superior Court a defendant may withdraw his or her plea if the intended sentence exceeds the parties’ agreed-upon recommendation or, if there is no agreed-upon recommendation, the recommendation of the prosecutor. In either event, the judge may indicate to the parties what sentence the judge would impose if the plea were to go forward.

## **Rule 12(d) Procedure If Plea Agreement Includes Both a Specific Sentence and a Charge Concession**

The procedure set out in Rule 12(d) applies to pleas and admissions conditioned on a plea agreement that includes both an agreed charge concession by the prosecutor and an agreement to a specific sentence. See Rule 12(b)(5)(A), discussed above. Under Rule 12(d)(6), discussed below, if the judge accepts such a plea agreement, the judge is bound to impose the agreed sentence. If, however, the judge rejects the plea agreement, either party may withdraw from the agreement. See Rule 12(d)(4)(B), discussed below. Because jeopardy attaches when the judge accepts a tendered plea or admission, at that point foreclosing the prosecutor’s withdrawal from any plea agreement, see *Commonwealth v. Dean-Ganek*, 461 Mass. 305, 312-313 (2012), the rule requires that the judge accept or reject a Rule 12(b)(5)(A) plea agreement prior to accepting the plea or admission. And, because such a plea agreement binds the judge if accepted, Rule 12(d) is structured to ensure that, at the time the judge must accept or reject the agreement, the judge has the

necessary information to determine if the agreed disposition would be just and appropriate for the case.

### ***Rule 12(d)(1) Disclosure of the Terms of the Plea Agreement***

Rule 12(d)(1) requires disclosure of the plea agreement at the beginning of the plea hearing. Because acceptance of the agreement binds the judge to sentence according to its terms, it is essential that this disclosure include a clear explanation on the record of those terms.

### ***Rule 12(d)(2) Tender of Plea***

Rule 12(d)(2) moves the tender of plea to the beginning of the plea procedure so that the terms of the plea or admission are clear at the outset. In District Court, if the plea agreement includes any probationary terms or conditions, the parties must consult with the probation department before tendering the plea so that probation will be in a position to provide any assistance that the judge may require in considering the plea or the plea agreement. See Dist./Mun. Ct. R. Crim. P. 4(c). The plea tender precedes Rule 12(d)(3)'s colloquy, which includes the notice of the consequences of the plea or admission, but Rule 12(d)(5) permits the defendant to withdraw the tendered plea or admission subsequent to being informed of its consequences and prior to the judge's acceptance of it.

### ***Rule 12(d)(3) Colloquy***

Rule 12(d)(3)(A) provides for the notice of consequences in terms substantively identical to those of 12(c)(3)(A). The above discussion of Rule 12(c)(3)(A) thus applies here with equal force.

Rule 12(d)(3)(B) and (C) respectively require the prosecutor's presentation of the factual basis for the charge and any victim-impact statements mandated by G.L. c. 258B. As with Rule 12(c)(3)(B), the prosecutor can satisfy this obligation to inform the judge of the factual basis of the charge in the traditional manner, stating the facts that he or she expects to prove if the case goes to trial, but the rule also permits presenting sworn testimony, at the request of the judge or otherwise. Rule 12(d)(3)(C) provides for the receipt of any victim-impact statements at this time. While in some instances it may not be necessary for the judge to hear the victim-impact statements before deciding whether to accept the plea agreement, the judge should not defer hearing from the victims absent the most unusual circumstances. Victim-impact statements delivered after the judge accepts the plea agreement can have no effect on the sentence.

Rule 12(d)'s placement of the facts describing the offense and its impact on the victims at this point in the procedure is necessary because, as noted, the rule requires that the judge accept or reject the plea agreement prior to accepting the plea itself, and that, if accepted,

the plea agreement binds the judge to sentence according to the agreement. It is thus essential that a judge have access to all of the facts pertinent to a just and appropriate disposition in the case prior to deciding whether to accept or reject the plea agreement under Rule 12(d)(4).

### ***Rule 12(d)(4) Review; Acceptance or Rejection of Plea Agreement***

As noted, to avoid the double-jeopardy bar to the prosecutor's withdrawal from a rejected plea agreement, the judge must accept or reject the plea agreement before accepting the plea or admission. See Dean-Ganek, 461 Mass. at 312-313. Rule 12(d)(4) imposes that timing requirement. At this point in the procedure, the judge has heard the facts of the charged offense and its impact on any victims. Moreover, in reviewing the plea agreement, the judge will hear from the parties concerning the agreed disposition and will have access to the probation department concerning the defendant, including any criminal history. See Rule 12(e), discussed below. However, if the judge believes that there might be other information pertinent to a just disposition in the case, the rule permits the judge sua sponte to continue the plea hearing in order to obtain and consider that information. Once the judge accepts the agreement, he or she is bound by its terms, and it is therefore essential that at this point the judge be fully satisfied that the agreed-upon sentence is fair, appropriate to the crime, and designed to diminish the risk of recidivism. The only timing requirement imposed by Rule 12(d)(4) is that the judge accept or reject such a plea agreement prior to accepting the guilty plea.

If the judge accepts the plea agreement, Rule 12(d)(4)(A) requires the judge to inform the defendant that the judge will impose the sentence provided in the agreement. If the judge rejects the agreement, Rule 12(d)(4)(B) requires that the judge so inform the parties and permit either party to withdraw from the plea agreement and further permit the defendant to withdraw the tendered plea. Rule 12(d)(4)(B)(i) here gives the judge discretion to inform the parties what sentence he or she would impose if the plea were to go forward. The judge's doing so gives the parties the opportunity to proceed on that basis without agreement under Rule 12(c), to re-fashion their plea agreement to conform to the judge's suggestion (thus binding the judge if the judge accepts that amended agreement), or to forego the plea and try the case. If the judge has doubts concerning the wisdom or fairness of the agreed disposition and believes that additional information might help to resolve those doubts, Rule 12(d)(4)(B)(i) permits the judge so to inform the parties. This gives the parties the opportunity, if one or the other has the requested information and is in a position to divulge it, to do so before the judge decides whether to accept or reject the agreement.

### ***Rule 12(d)(5) Findings of Judge as to Plea Agreement and Plea; Acceptance of Plea***

If the judge accepts the plea agreement, Rule 12(d)(5) provides that the judge ask the defendant if the defendant wishes to go forward with the tendered plea or admission. At this point, the judge has informed the defendant of the consequences of the plea, including what the sentence will be, and the defendant has heard the factual basis of the charged offense and any victim statements as to its impact. If the defendant elects to go forward with the plea, the judge must then make the necessary inquiries to satisfy the judge that the plea agreement and the plea or admission are knowing and voluntary. Rule 12(d)(5) is intended to make no change to former Rule 12(c)(5)'s provision for a voluntariness hearing except that the hearing also applies to the plea agreement on which the plea or admission is conditioned.

Rule 12(d)(5) requires the judge to find that there is an adequate factual basis for the plea or admission. Rule 12(d)(5) preserves the former Rule 12(c)(5)(A)'s provision that the defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea, and the rule is not intended to work any change on its predecessor in this regard.

Once satisfied that the plea agreement and the plea or admission are knowing and voluntary, and that the plea or admission is supported by an adequate factual basis, the judge is in a position to accept the tendered plea or admission. Of course, if the judge is not satisfied in this regard, or, if for some other reason the judge determines that the plea or admission is not just, the judge is permitted to reject the plea or admission. Rule 12(d)(5) is not intended to deprive the judge of this longstanding discretion, even if the judge has accepted the plea agreement on which the plea or admission is conditioned. See *Commonwealth v. Dilone*, 385 Mass. 281, 285 (1982) (acceptance of a guilty plea is "wholly discretionary with the judge"), citing *Santobello v. New York*, 404 U.S. 257 (1971); E. Cypher, 30A Mass. Prac., Criminal Practice & Procedure, Judge may refuse to accept guilty plea, plea of nolo contendere or admission to sufficient facts, § 24:60 (4th ed. 2014).

### ***Rule 12(d)(6) Sentencing***

If the judge accepts the plea or admission, the judge must impose a sentence according to the terms of the plea agreement, including any agreed-upon probationary term. It lies with the judge, however, in consultation with probation where appropriate, to decide what conditions of probation are appropriate. To the extent that the plea agreement contains agreed-upon recommended conditions of probation, they are not binding on the judge; rather, they are to be considered as joint recommendations for the judge to consider, and neither party has the right to withdraw the plea or from the agreement if the judge declines

to follow such recommendations. Unlike Rule 12(c)(6), Rule 12(d)(6) does not provide for the defendant's right to withdraw his or her plea in District Court. That right, afforded by G.L. c. 278, § 18, does not here apply. Under Rule 12(b)(5), the defendant agreed to and thus requested the sentence set forth in the plea agreement. A sentence that comports with that agreement therefore cannot exceed the defendant's requested disposition.

## Rule 12(e) Availability of Criminal Record and Presentence Report

Rule 12(e) is amended to recognize an admission to sufficient facts in District Court as the equivalent of a guilty plea, see, e.g., Rule 12(a)(2), and to omit the requirement that the parties must file a written motion to obtain a presentence report. The former amendment conforms Rule 12(e) to Rule 12(a)(2) as it was amended in 2004, and the latter amendment achieves consistency between Rule 12(e) and Rule 28(d)(2). Further, the rule is amended to ensure that a judge considering whether to accept a binding plea agreement under Rule 12(d)(4) has both an updated record of the defendant's criminal record and any presentence report prepared by probation under Rule 28(d)(2).

## Rule 12(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements

The 2015 amendments made no changes to Rule 12(f).

### *(2004, Revised)*

Although analogous to Fed. R. Crim. P. 11, in its original form in 1979 this rule was drawn from a number of sources. See, e.g., A.B.A. Standards Relating to Pleas of Guilty (Approved Draft, 1968); A.L.I. Model Code of Pre-Arrest Procedure §§ 350.1-.9 (POD 1975); National Advisory Commission on Criminal Justice Standards & Goals, Courts, Standards 3.1 et seq. (1973); President's Commission on Law Enforcement & Administration of Justice, Task Force Report: The Courts 4-13 (1967). The rule was amended in 1987 to remove the option, contained in original subdivision (c)(2)(B), which allowed a judge to sentence a defendant more harshly than the terms of a prosecutor's sentence recommendation without giving the defendant an opportunity to withdraw the plea. In 2004, the rule was further amended, retaining its basic structure but bringing the details of the process up to date, in light of the abolition of trial de novo and other developments in the law.

As the United States Supreme Court has observed:

*Whatever may be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.*



Blackledge v. Allison, 431 U.S. 63, 71 (1977). Accord, Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978). Rule 12 is intended to guarantee the proper administration of the guilty plea and plea bargaining process.

The proffer by a defendant of a guilty plea is a significant step in the criminal process. It represents a decision by the defendant not to put the Commonwealth to the test of proving his or her guilt beyond a reasonable doubt. Plea bargaining, of course, flows from the “mutuality of advantage” to defendants and prosecutors, each with their own reasons for wanting to avoid trial, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978), but the Commonwealth and the public have an interest in promoting fairness by insuring that each plea is an accurate reflection of guilt and a fair termination of criminal proceedings against a defendant. Rule 12 is intended to promote attainment of those goals.

## Subdivision (a)

### **(a)(1)**

This subdivision is adopted from A.B.A. Standards Relating to Pleas of Guilty § 1.1 (Approved Draft, 1968), which substantially accords with Fed. R. Crim. P. 11(a)-(b).

Under criminal practice prior to the adoption of rule 12, former G.L. c 227, § 47A (St 1978, c 478, § 298) provided that the defendant could plead not guilty, guilty, or nolo contendere. Rule 12 preserves these options.

The Rule does not establish the precise words a defendant must use in order to plead guilty. While the absence of the actual phrase “I plead guilty” or the word “guilty” is not sufficient by itself to invalidate a purported guilty plea, see *Commonwealth v. Cavanaugh*, 12 Mass. App. Ct. 543 (1981), in order to avoid confusion, a judge should clarify the intent of any defendant who does not use clear language to identify a desire to enter a guilty plea. Stipulations by the defendant to the truth of facts that are conclusive of guilt are the functional equivalent of a guilty plea and fall within the confines of Rule 12. See *Commonwealth v. Hill*, 20 Mass. App. Ct. 130 (1985). On the other hand, if all the defendant stipulates to is that the Commonwealth's witnesses would testify in the manner described by the prosecutor, then the defendant's act would not be the complete waiver that a guilty plea entails, see *Commonwealth v. Garcia*, 23 Mass App 259, 265 (1986).

The requirements of this subdivision are to insure that the fact that the plea was the informed and voluntary act of the defendant appears upon a contemporaneous record of the proceeding, thus reducing the likelihood of a post-conviction attack on the validity of a plea of guilty or nolo contendere. See, e.g., *Commonwealth v. Foster*, 368 Mass 100 (1975).

Therefore, except where a corporation is the defendant, or where the defendant is permitted by the General Laws to pay a fine by mail or by appearing before a clerk personally or by authorized agent, the defendant personally must plead if the plea is to be guilty or nolo contendere. The defendant must also personally plead not guilty except where his or her appearance is excused pursuant to Mass. R. Crim. P. 7(a)(2) and the court enters the plea on the defendant's behalf. Mass. R. Crim. P. 7(d)(2).

The requirement that the plea be accepted in open court is based upon G.L. c. 263 § 6, and furthers the goal that it be free from the suspicion of coercion and that it is a knowing and intelligent waiver of the defendant's right to a trial. Thus, all pleas should be entered under the scrutiny of the judge in formal proceedings and be recorded, whether by stenographic or electronic means.

### **(a)(2)**

An admission to sufficient facts to warrant a finding of guilty is a procedural device that had its genesis in the trial de novo system. Rather than entering a guilty plea, which would have had the consequence of limiting the de novo trial to the issue of the sentence, a defendant in the first tier of the de novo system could admit to sufficient facts and preserve his option of a full trial de novo. Admissions to sufficient facts have proved useful for another reason however. They offer a way to allow the defendant's case to be continued without a guilty finding, something that a traditional guilty plea is ill suited to accomplish. As the Supreme Judicial Court has recognized, a continuance without a finding (CWO) is a procedure that often serves the best interests of both the Commonwealth and the defendant. See *Commonwealth v. Duquette*, 386 Mass. 834, 840 (1982). Admissions to sufficient facts and CWOs were common at both levels of the trial de novo system in the District Courts. After the abolition of trial de novo, they continue to be prevalent in the District Court and Juvenile systems. See G.L. c 278 § 18 (allowing a District Court defendant to request that a case be continued without a finding and requiring that an admission to sufficient facts be treated as the equivalent of a guilty plea for purposes of the “defense capped plea” procedure discussed *infra* in subsection (c)(2)(B)).

If a defendant desires to admit to sufficient facts, the judge should interrogate the defendant personally to insure that the defendant understands the nature and consequences of such an admission. In the years since Rule 12 was originally promulgated, the Supreme Judicial Court has held that an offer to admit to sufficient facts triggers essentially the same safeguards required when a defendant offers to plead guilty. See *Commonwealth v. Lewis*, 399 Mass. 761, 763 (1987); *Commonwealth v. Duquette*, 386 Mass. 834, 838 (1982).

### **(a)(3)**

Requiring the permission of the court to enter a guilty plea or plea of nolo contendere accords with the practice that prevailed prior to the adoption of Rule 12. By court rule, no defendant was permitted to plead guilty or nolo contendere to a complaint for which a sentence of imprisonment may be imposed unless the judge was fully satisfied that certain conditions had been met. See District Court Initial Rules of Criminal Procedure 4 (1971); Rules of the Mun. Ct. for the City of Boston Sitting for Criminal Business 4 (1971).

A defendant does not have a constitutional right to have a guilty plea accepted by the court, see *North Carolina v. Alford*, 400 U.S. 25, 38 n. 11 (1970); *Commonwealth v. Dilone*, 385 Mass. 281 (1982); *Commonwealth v. Kelliher*, 28 Mass. App. Ct. 915 (1989). An admission to sufficient facts is very much like an Alford plea or a plea of nolo contendere, in that the defendant does not explicitly admit guilt. The same considerations that may inform a judge's decision to refuse to accept that latter two pleas apply equally in the case of the former.

A judge may refuse to accept a guilty plea, admission to sufficient facts, or plea of nolo contendere for a variety of reasons. So long as the judge's decision is not arbitrary or based on an impermissible factor, the sound exercise of discretion supports a decision to refuse to accept a plea. See Rossman, *Guilty Pleas*, 2 Criminal Law Advocacy, ¶ 8.04(3)(a). Among the common reasons to refuse to accept plea are: the plea is involuntary; the defendant does not understand the nature of the charge [c] [5] [A], *infra* or the consequences of the plea [c] [3], *infra*; there is no factual basis for the plea [c] [5] [a], *infra*; or there is a factual dispute that should be litigated at trial.

## **Subdivision (b)**

Section (e)(1)-(5) of Federal Rule of Criminal Procedure 11 is the prototype for this subdivision.

### **(b)(1)**

This subdivision outlines the scope of agreements as to concessions or other actions which the defendant and the prosecution may arrive at prior to plea proceedings before a judge. It must be emphasized that these negotiations are to be between defense counsel, or the defendant in an appropriate case, and the prosecution. Judges should not “participate as active negotiators in plea bargaining discussions,” *Commonwealth v. Gordon*, 410 Mass. 498, 501 n. 3 (1991).

When a judge takes part in plea negotiations, it raises several troubling possibilities:

*[it] (1) can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to the trial before this judge; (2) ... makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) ... is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.*

*Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618 n.7 (1982) (quoting § 3.3(a) of the A.B.A. Standards supra). For the type of participation that a judge should avoid, see Commonwealth v. Carter 50 Mass App 902 (2000) (judge's statement at side bar that if defendant proceeded with trial and was found guilty, he would impose sentence of 18-20 years, but that if defendant pleaded guilty, sentence would be six years to six years and one day was coercive, making defendant's guilty plea involuntary).*

The list of actions set out in this subsection that a prosecutor may include in a plea agreement is not exhaustive and allows for considerable flexibility. For example, the parties may agree to a joint sentence recommendation or to present disparate positions, and may propose that the agreement either does not bind the judge or to one that allows the defendant to withdraw the plea if the judge does not agree. Some of the concessions a prosecutor may make in plea negotiations relate to action over which the judge has control, such as the imposition of a particular sentence. Other concessions, as in an agreement not to bring additional charges, are totally within the purview of the prosecutor. Since the doctrine of separation of powers gives the prosecutor the authority to decide what criminal charge the Commonwealth should bring against a defendant, a judge may not accept a guilty plea to a lesser included offense over the prosecutor's objection. See *Commonwealth v. Gordon*, 410 Mass. 498, 503 (1991).

### **(b)(2)**

Early and full disclosure of a plea arrangement reduces the risk of an unfair agreement—unfair to the public because of an unwarranted concession by an overburdened prosecutor anxious to avoid trial, or unfair to the defendant because the concession is either illusory, or so irresistible in light of the inevitable risks of trial as to induce an innocent defendant to plead guilty. E.g., *Jones v. United States*, 423 F.2d 252, 255 (9th Cir 1970). Disclosure of the terms of a plea agreement also will allow the court to monitor the prosecutor's performance. In addition, placing the agreement on the record will avoid disputes that may arise in an attack on the validity of the guilty plea. For these reasons and to expedite the proceedings, this subdivision requires that the court be informed at the outset of the

existence of any agreement. If upon inquiry under subdivision (c)(1), *infra*, the defendant denies any such agreement, it is incumbent upon the prosecutor to notify the court if an agreement in fact has been made. For an example of the difficulties that can arise when the parties do not disclose the terms of a plea agreement, see *Commonwealth v. Johnson*, 11 Mass. App. Ct. 835 (1981).

A judge does not improperly participate in plea negotiations simply by having the parties disclose the substance of a plea arrangement pursuant to this subdivision.

## Subdivision (c)

Subdivision (c)(1) is a product of *Santobello v. New York*, 404 U.S. 257 (1971), where it was held that:

*when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.*

*Id.* at 262. The Court stated further that the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances and if a plea is induced by promises, their essence must in some way be known. 404 U.S. 261, 262.

If upon inquiry the defendant replies that no promises have been made, the judge should instruct the defendant that any promises relating to the imposition of sentence are in no way binding on the court. See Subdivisions (b)(1)-(2), *supra*. This is because defendants are often loathe to disclose such promises, although it is believed that the increased acceptability of the plea arrangement procedure of this rule will obviate such difficulties.

The effect of such an instruction will depend on the facts of each case, but in no case can it cure the prejudice resulting from a broken promise.

The words of the Supreme Court as to the binding character of defense-prosecution agreements deserve repetition:

*when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled.*

*Santobello v. New York*, 404 U.S. 257, 262 (1971). This accords with established doctrine in the Commonwealth long before the adoption of Rule 12. The Supreme Judicial Court, in 1899, stated that:

*When ... promises are made by the public prosecutor or with his authority, the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept.*

Commonwealth v. St. John, 173 Mass. 566, 569 (1899). See also, Commonwealth v. Benton, 356 Mass. 477 (1969); Commonwealth v. Harris, 364 Mass. 236, 238 (1973); Commonwealth v. Santiago, 394 Mass. 25 (1985); Commonwealth v. Parzyck, 41 Mass. App. Ct. 195 (1996).

Whether a plea bargain actually exists that obligates the prosecutor to perform a promise upon which the plea is contingent depends on an objective evaluation of the underlying circumstances that led to the plea. See *Blaikie v. District Attorney for Suffolk County*, 375 Mass. 613, 616 n. 2 (1978) (the prosecutor's subjective understanding of the bargain is irrelevant); *Commonwealth v. Santiago*, 394 Mass. 25, 28 (1985) ("The touchstone for determining whether a defendant has been improperly denied the advantages he expected from a plea bargain is whether that defendant has reasonable grounds for reliance on his interpretation of the prosecutor's promise."); Rossman, *Guilty Pleas*, 2 Criminal Law Advocacy, ¶7.05(1) (subjective impressions alone never entitle the defendant to the benefit of an illusory agreement).

If the court determines that a plea agreement existed, and that the defendant has fulfilled his or her part of the bargain, the defendant is entitled to the benefit of the prosecutor's performance of the countervailing promise. If the Commonwealth seeks to avoid performance on the ground that the defendant has not lived up to the terms of the agreement, then the prosecutor bears the burden of proof on this issue. See *Doe v. District Attorney for Plymouth Dist.*, 29 Mass. App. Ct. 671, 677 n.6 (1991). In the usual course of events, all the defendant need do to fulfill his or her obligation under a plea agreement is to offer a guilty plea. However, the right to enforce a plea agreement may arise beforehand, if the defendant has relied to his or her detriment on a prosecutor's promise. See *id.* at 674 ("concerns about fairness which underlie the requirement that the government abide by its agreements are solidly engaged once an accused person has relied to his detriment upon a plea agreement, even if that occurs before entry of a guilty plea.") Compare *Blaikie v. District Attorney for Suffolk County*, 375 Mass. 613, 618 (1978) (Specific performance is in no sense mandated where no guilty plea has been entered, and the defendant's position has not been adversely affected).

The purposes of subdivision (c)(1) are fourfold. First, airing plea agreements in open court enhances public confidence in the administration of justice. E.g., *Jones v. United States*, 423 F.2d 252, 255 (9th Cir 1970). Secondly, disclosure of prosecutorial promises is the best way to test the voluntariness of the plea. By testing the strength of the inducement, the

court obtains the best available evidence of its effect upon the defendant. Thirdly, this helps to implement the “factual basis” requirement of subdivision (c)(5)(A), for promises that offer unusual leniency to a defendant are suspect. Finally, this requirement will help to uncover promises that are by their nature improper and thus help to eliminate whatever incentive the prosecution might have to offer improper inducements.

Pursuant to this subdivision and subdivision (b)(2), *supra*, the prosecutor and defense counsel have the duty to come forward and disclose the existence and terms of a plea arrangement if the defendant balks at his opportunity to do so (even if the court does not specifically question the prosecutor or defense counsel on this issue). See *Commonwealth v. Santon*, 2 Mass. App. Ct. 614 (1974). This is important practically because often the defendant will not fully disclose the terms of the arrangement. It is important legally because the prosecutor and defense counsel should inform the court whenever they are aware that testimony offered in court is not in full accord with the truth as they know it. See Supreme Judicial Court Rule 3:07, MA Rules of Pro. Conduct, R. 3.3

### **(c)(2)**

Under subdivision (c)(2)(A) the judge may inform the defendant that the court is disposed to accept the prosecutor's sentence recommendation, pending the outcome of the hearing required by subdivision (c)(5), and that the judge will not exceed that recommendation without giving the defendant an opportunity to withdraw the plea. As originally promulgated, subdivision (c)(2)(b) allowed the judge an alternative course of action, indicating that the court did not intend to entertain or consider any recommendation, in which event the judge's sentencing discretion would be unrestricted. In 1987, this provision was eliminated from the Rule. The effect of the amendment was to provide defendants pleading guilty pursuant to a sentencing bargain more certainty about their fate.

Prior to the 1987 amendment, a judge could force a defendant who chose to plead guilty on the strength of a plea agreement specifying that he or she should receive a particular sentence to “plead in the dark.” If the judge took advantage of option (B) of the original subsection, he or she could categorically refuse to tell a defendant who entered a negotiated plea whether the court would abide by the recommendation or not. Such a judge forced the defendant to bear the risk of waiving the right to trial and receiving nothing in return. After 1987, defendants entering plea agreements based on a joint sentence recommendation knew where they stood prior to irrevocably waiving their right to a trial.

In 2004, this subsection was amended to add new subdivision (c)(2)(B), to reflect the “defense capped plea” procedure provided for by statute in the District and Juvenile Courts. Part of the legislation that abolished the trial de novo system, G.L. c. 278 § 18, gave defendants in District Court who did not reach an agreement with the prosecutor the right

to offer a guilty plea or admission to sufficient facts contingent upon the judge's accepting any disposition of the case within the court's jurisdiction. The new subdivision (c)(2)(B) reflects this practice. The defense capped plea procedure applies in all District, Municipal and Juvenile courts. See G.L. ch. 119, § 55B. Neither Rule 12 nor G.L. c. 278 § 18 establish how many times a defendant may tender a defense capped plea. Individual judges are free to formulate their own policy on this issue as the needs of their particular courts dictate. A District or Juvenile Court judge has the power to accept a proposed disposition under this procedure even if it entails continuing the case without a finding over the objection of the prosecutor. Although ordinarily the separation of powers doctrine prevents a judge from foreclosing the prosecution's effort to conclude a case with either a conviction or acquittal on the original charge, the legislature's specific sanction of the CWOFF option in the defense capped plea procedure legitimates it. Compare *Commonwealth v. Pyles*, 423 Mass. 717 (1996) (grant of authority by G.L. c. 278 § 18 specifically gives District Court judges authority to continue a case without a finding over the objection of the prosecutor) with *Commonwealth v. Cheney*, 440 Mass. 568 (2003) (Superior Court judge lacks power to dismiss case in the interest of justice over the objection of the prosecutor as this procedure is only available under G.L. c. 278 § 18 which applies only to District and Juvenile Courts); *Commonwealth v. Tim T.*, 437 Mass. 592 (2002) (without statutory authority akin to G.L. c. 278 § 18, Juvenile Court judge lacks power to place defendant on pretrial probation over the objection of the prosecutor). However, if a judge does accept the defendant's proposal to continue a case without a finding over the prosecutor's objection, the record should reflect the reasons for the conclusion that this action is in the best interests of justice. See *Pyles*, *supra*, at 723.

If the defendant has offered a plea or admission under either subdivision (c)(2)(A) or (c)(2)(B), the judge may not impose a sentence harsher than the one upon which the defendant's action is predicated. Judges should pay careful attention to dispositions involving probationary terms or a suspended sentence to ensure that they conform to the legitimate sentence expectation of the defendant. See e.g., *Commonwealth v. Glines*, 40 Mass. App. Ct. 95 (1996) (where District Court judge imposed a sentence of probation with a suspended term of five years, it was more severe than the defendant's request for probation with 2 1/2 years suspended); *Commonwealth v. Barber*, 37 Mass. App. Ct. 599 (1994) (where pursuant to a plea agreement, prosecutor recommended the defendant receive a 12-15 year sentence concurrent with other sentences the defendant received, and the judge imposed a suspended sentence of 12-15 years, consecutive to the other sentences the defendant received, and placed the defendant on probation for two years, the judge exceeded the terms of the prosecutor's recommendation).



**(c)(3)**

This subdivision was originally patterned after Fed. R. Crim. P. 11(c)-(d). In addition, it drew upon District Court Initial R. Crim. P. 4 (1971); Sections 1.4 and 1.5 of the ABA Standards Relating to Pleas of Guilty (Approved Draft, 1968); A.B.A. Standards Relating to the Function of the Trial Judge § 4.2 (Approved Draft, 1972); Rules of Criminal Procedure (U.L.A.) rule 444(b) (1974); A.L.I. Model Code of Pre-Arrest Procedure § 350.4 (POD 1975); and the National Advisory Commission on Criminal Justice Standards & Goals, Courts, standard 3.7 (1973).

In 2004, this subdivision was amended to eliminate a provision allowing defense counsel to conduct the colloquy with the defendant. The Supreme Judicial Court has disapproved of defense counsel conducting guilty plea colloquies, as far back as *Commonwealth v. Morrow*, 363 Mass. 601 (1973) (“the spontaneity and flexibility of the dialogue, which supports a conclusion of voluntariness, can best be achieved where the judge asks the questions. This also avoids even the appearance that the colloquy is but a prearranged script. Therefore, we think it would be better practice for the judge to ask the questions.”) By statute, defense counsel cannot conduct the part of the colloquy dealing with warnings of immigration consequences, see *Commonwealth v. Villalobos*, 437 Mass. 797 (2002).

The responsibility for conducting a meaningful colloquy with the defendant properly rests on the judge's shoulders. This requires “a continuing effort on the part of trial judges, with the help of counsel, so to direct their questions as to make them a real probe of the defendant's mind ... It is not to become a ‘litany’ but is to attempt a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure.” *Commonwealth v. Fernandes*, 390 Mass. 714, 716 (1984) **quoting** *Commonwealth v. Foster*, 368 Mass. 100, 107 (1975) (emphasis added). The colloquy should include an inquiry into any mental illness from which the defendant may be suffering, and whether the defendant is under the influence of alcohol or drugs. See *Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717-718 (1997).

The Supreme Judicial Court has suggested the utility of using a checklist to ensure that a plea colloquy is both comprehensive in scope and meaningful in substance. See *Commonwealth v. Colon* (2003) 439 Mass 519, 530 quoting *Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 501-502, (1985):

[Post conviction attacks on the validity of a plea can] be minimized if not wholly avoided, and justice better and more humanely administered in the first instance, if judges permitted themselves to be assisted by the carefully drafted and fully inclusive model questionnaires that have long been available ... We do not suggest that any model should

be followed mechanically; indeed such a practice would be unwise because it could interfere with a probing exchange. Nevertheless a model can serve as a guide and checklist. We would suggest, as well, that a duty is cast on the lawyers on both sides to be alert and helpful if it appears that the judge through inadvertence may not be carrying out the full requirements of the rule. (Footnote omitted)

The information about the consequences of a conviction should be part of the oral dialogue between the judge and the defendant. It is not sufficient for a judge to rely on the defendant's acknowledgment of this information on a written form. See *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572 (2001); *Commonwealth v. Hilaire*, 51 Mass. App. Ct. 818, 823 (2001) (“During a colloquy, the judge has the opportunity to observe and interact with the defendant and can communicate the warnings to the ... defendant with greater assurance than can be supplied by the preprinted ... form.”)

While the judge is the one who conducts the colloquy, all the parties share the responsibility to make certain that defendants are informed of the consequences of a plea or admission. As the United States Supreme Court said, with respect to the obligation of defense attorneys in federal criminal cases:

*Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.*

*Libretti v. United States*, 516 U.S. 29, 50-51 (1995). The prosecutor also has a role to play in ensuring that the court is aware of any information that might bear on the legitimacy of the plea and that the colloquy covers all of the necessary topics. See *State v. Rodriguez*, 112 Ariz. 193, 540 P.2d 665 (1975).

Subdivision (c)(3)(A) enumerates the plea's immediate consequences of which a defendant must be specifically informed. It imposes a responsibility on the judge not only in cases where the defendant has tendered a traditional guilty plea or a nolo contendere plea, but also where a defendant has offered to admit to sufficient facts to warrant a finding of guilty. The Rule was amended in 2004 to cover this last category in recognition of the fact that in the years since Rule 12 was originally promulgated, the Supreme Judicial Court held that an offer to admit to sufficient facts triggers the essentially the same safeguards required when a defendant offers to plead guilty. See *Commonwealth v. Duquette*, 386 Mass. 834, 838 (1982) (an admission to sufficient facts is the functional equivalent of a guilty plea and the record must reflect the defendant waived the right to trial knowingly and voluntarily); *Commonwealth v. Lewis*, 399 Mass. 761, 763 (1987).

The United States Supreme Court held in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) not only that a defendant must understand that he or she waives the privilege against self incrimination, the right to trial by jury, and the right to confront one's accusers by entering a guilty, but also that a court could not presume a waiver of these rights from a silent record. Prior to the adoption of Rule 12 in 1979, the Supreme Judicial Court held in *Commonwealth v. Morrow*, 363 Mass 601, 604-05 (1973), that “it would be better practice to include specific inquiry as to the defendant's understanding waiver of the three constitutional rights.”

In 2004, this subdivision was amended to require an additional warning of rights be given to the defendant, concerning the right to be presumed innocent until proved guilty beyond a reasonable doubt. Although not constitutionally required, it is sound practice to include it. The Supreme Judicial Court has recommended its use in cases where the defendant is willing to plead guilty but does not acknowledge all of the elements of the factual basis. See *Commonwealth v. Earl*, 393 Mass. 738, 742 (1985) (“when a judge concludes that he is satisfied that there is a factual basis for a charge to which a defendant is willing to plead guilty, but the defendant does not acknowledge all the elements of the factual basis, it would be better practice for the plea judge to advise the defendant that his guilty plea waives his right to be presumed innocent until proved guilty beyond a reasonable doubt.”)

It has been recommended that the proper formulation for advising a defendant as to his waiver of a jury trial is that “by pleading guilty he [gives] up his right to a ‘trial with or without a jury,’” *Commonwealth v. Hamilton*, 3 Mass. App. Ct. 554, 557 n. 4 (1975). This instruction will serve to emphasize that, upon acceptance of a guilty plea, no trial will be held and all that remains is the imposition of sentence. However, the judge does not have to include information about the difference between a jury trial and a bench trial. See *Commonwealth v. Gonsalves*, 57 Mass App 925 (2003). Nor does the colloquy have to include information about the loss of the opportunity to appeal issues, such as the court's action in denying a suppression motion. See *Commonwealth v. Quinones*, 414 Mass. 423, 435 (1993); *Commonwealth v. Hamilton*, 3 Mass App. Ct. 554, 558 n. 6 (1975) (if such information is given, it will “require careful formulation to avoid creating confusion as to the right to appeal to the Appellate Division of the Superior Court and the right to post-conviction remedies under special circumstances.”)

Pursuant to subdivision (c)(3)(B), the defendant is to be informed of the sentencing consequences of a conviction based upon the tender of a plea or admission. The judge should inform the defendant of the maximum sentence of each offense to which the defendant is offering a plea or admission. In some circumstances, the maximum sentence will depend on whether the defendant has previously been convicted. The judge must take

this possibility into account. General Laws c. 279, § 25, which mandates the maximum sentence for a felony defendant who has been previously convicted of two felonies and sentenced to more than three years on each, is an example of that type of provision contemplated by the “second offense” language of (c)(3)(B).

If probation is not a sentencing option, the judge must inform the defendant of any applicable mandatory minimum sentence as well. If the judge imposes a sentence of straight probation (one without a concomitant suspended term), the judge must inform the defendant of the maximum term, and any mandatory minimum term, that could be imposed if probation is revoked. See *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572 (2001). In 2004, this subsection was amended to eliminate the requirement that the judge inform the defendant of the maximum sentence possible if the defendant received consecutive sentences. See *United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997) (where it is not mandatory to impose consecutive sentences, defendant need not be informed of that possibility in order to enter a knowing and intelligent guilty plea); *United States v. Hamilton*, 568 F.2d 1302, (9th Cir.) cert. denied 436 U.S. 934 (1978) (the possibility of consecutive sentences was implicit in the separate explanation of the possible sentence on each charge).

Conviction of certain sex crimes carries with it three consequences that also must be included in the plea colloquy in a relevant case. First, if the defendant is subject to commitment as a sexually dangerous person, see G.L. c. 123A, the judge must include notice of that possibility prior to accepting the plea or admission. This provision has been part of Rule 12 since its adoption, changing the practice that prevailed prior to 1979. See *Commonwealth v. Morrow*, 363 Mass 601, 606 (1973) (being subject to the “sexually dangerous person” provision “is but one of many contingent consequences of being confined” after conviction, and therefore need not be explained to a defendant). Since a 2004 amendment to G.L. c. 123A § 12 makes a defendant subject to commitment as a sexually dangerous person despite the nature of the offense to which the defendant is pleading guilty, so long as the defendant has been convicted any time in the past of a designated sex offense, a warning of the possibility of commitment under c. 123A should be included as a matter of routine unless it is clear from the defendant's prior record that it is not relevant.

Second, if the defendant is tendering a plea or admission to an offense which might subject him or her to the possibility of community parole supervision for life, a 2004 amendment to this subsection requires the judge to notify the defendant of this possibility. Because the prospect of life time parole is an additional form of punishment, it should be

part of the information the defendant receives about the maximum sentence he faces. G.L. c. 265 § 45 specifically refers to community parole supervision for life as punishment.

Third, a 2004 amendment incorporated into this subsection the requirement of G.L. c. 6, § 178E(d), that a court accepting a plea for a sex offense inform the defendant that the plea may result in the defendant's being subject to the provisions of the sex offender registration statute. The statute states that failure to provide this information shall not be grounds to vacate or invalidate the plea, and the inclusion of this requirement in Rule 12(c)(3)(B) does not enlarge the grounds on which a defendant can invalidate a plea after the fact.

The failure to inform the defendant of the sentencing consequences of a plea may result in the conviction being set aside because the plea was not a knowing and intelligent waiver. E.g., *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572 (2001) (failure to inform the defendant of the maximum sentence and mandatory minimum sentence upon revocation of probation). However, “not every omission of a particular from the protocol of the rule ... entitles a defendant at some later stage to negate his plea and claim a trial.”

*Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 494 (1984). E.g., *Commonwealth v. Cavanaugh*, 12 Mass. App. Ct. 543, 545-546 (1981) (where defendant received the sentence recommended by the prosecutor, the judge's failure to inform him of the maximum possible sentence was harmless beyond a reasonable doubt).

While there are consequences beyond those enumerated in this subdivision that might influence a defendant's decision to plead guilty, if they are collateral, in the sense of being contingent upon some future event or subject to discretion or under the control of the federal government or that of another state, they need not be incorporated into the plea colloquy. For example, ordinary parole consequences need not be part of the judge's warnings, see *Commonwealth v. Santiago*, 394 Mass. 25, 30 (1985), nor is ineligibility to receive good time deductions from a sentence being served after conviction of certain crimes, see *Commonwealth v. Brown*, 6 Mass. App. Ct. 844 (1978) (rescript).

Subdivision (c)(3)(c) was added in 2004, and is based on the requirement in G.L. c. 278, § 29D, that a defendant who pleads guilty or nolo contendere must be advised that if he or she is not a United States citizen, a conviction may have the consequences of deportation, exclusion of admission, or denial of naturalization. This subdivision, however, is broader than the statute. The Supreme Judicial Court has held that this warning is also required when the defendant offers an admission to sufficient facts, see *Commonwealth v. Mahadeo*, 397 Mass. 314 (1986), and so the Rule requires an “alien” warning in those cases as well. In addition, the Rule requires the defendant to be warned of the potential adverse impact of the plea or admission, rather than of a conviction, as the statute requires. Under current immigration law, the statute's warning may be misleading since adverse

consequences can flow from an admission to sufficient facts not followed by a conviction. See *Commonwealth v. Villalobos*, 437 Mass. 797 (2002). By warning the defendant that a plea or admission can have adverse immigration consequences, the court necessarily conveys not only the message about the effect of an ensuing conviction but also alerts the defendant to the possibility of adverse consequences from the plea or admission itself.

**(c)(4)**

To this point the court has been informed of the existence of and substance of a plea arrangement, has indicated a willingness to entertain that arrangement, and has informed, or caused, the defendant to be informed of the consequences of acceptance of the plea. The defendant now formally tenders a plea or admission to the court, which then conducts a hearing to determine whether it is a knowing, intelligent, and voluntary waiver.

**(c)(5)**

By requiring an inquiry into the “voluntariness” of the plea or admission, this subdivision requires the judge to ensure two basic foundations for a valid waiver. First is that the defendant understands the consequences of his or her act. Courts often refer to this standard as requiring the plea to be a knowing and intelligent act. In addition, the defendant's decision must be free from improper influence. As the Supreme Court, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), declared, a waiver is “an intentional relinquishment or abandonment of a known right or privilege.” *Id.* at 464 (emphasis supplied).

In order to enter a valid guilty plea, the defendant must be competent. Under both the federal and state constitutions, the test of competence to plead is the same as that for standing trial. See *Godinez v. Moran*, 509 U.S. 389 (1993); *Commonwealth v. Blackstone*, 19 Mass. App. Ct. 209 (1985). The standard for determining competency to stand trial is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Commonwealth v. Russin*, 420 Mass. 309, 317 (1995) quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960). The substituted judgment doctrine, by which the court appoints a guardian to act, is not an appropriate vehicle for an incompetent defendant who offers to plead guilty. See *Commonwealth v. Del Verde*, 398 Mass. 288 (1986).

In *Huot v. Commonwealth*, 363 Mass. 91, 99-101 (1973), the court recognized that *Boykin v. Alabama*, 397 U.S. 238 (1969) placed the burden of establishing on review that a guilty plea is made voluntarily and intelligently is on the prosecution. The Commonwealth must meet that burden and the hearing that this subsection establishes is designed to meet that end.

The Supreme Judicial Court, in *Commonwealth v. Lopez*, 426 Mass. 657, 660, (1998), stated the appropriate standard:

*As a general proposition of constitutional law, a guilty plea may be withdrawn or nullified if it does not appear affirmatively that the defendant entered the plea freely and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). See Brady v. United States, 397 U.S. 742, 748 (1970); Commonwealth v. Foster, 368 Mass. 100, 106 (1975). Rule 12 (c) (3) of the Massachusetts Rules of Criminal Procedure, requires that a defendant be informed on the record of the three constitutional rights which are waived by a guilty plea: the right to trial, the right to confront one's accusers, and the privilege against self-incrimination. See Boykin v. Alabama, supra at 243; Commonwealth v. Lewis, 399 Mass. 761, 764 (1987). Moreover, the plea record must demonstrate either that the defendant was advised of the elements of the offense or that he admitted facts constituting the unexplained elements. See Henderson v. Morgan, 426 U.S. 637, 646, (1976); Commonwealth v. Colantoni, 396 Mass. 672, 678-679 (1986). Finally, the plea record must demonstrate that the defendant pleaded guilty voluntarily and not in response to threats or undue pressure. See Commonwealth v. Foster, supra at 107.*

The first distinct requirement is that the defendant understand the nature of the charge. A plea may be involuntary because the defendant has such an incomplete understanding of the charge that the plea is an unintelligent admission of guilt. Without adequate notice of the nature of the charge against him, or an indication that the defendant in fact comprehends the charge, the plea cannot stand as voluntary. See *Smith v. O'Grady*, 312 U.S. 329 (1941). In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Supreme Court held that a guilty plea to a charge of second-degree murder was involuntary because the defendant was not informed that intent to cause death was an element of that crime. The Court assumed, without deciding, that notice of the true nature, or substance, of a charge does not always require a description of every element of the offense, however. *Id.* at 647 n. 18. The Court agreed with the government that in the usual case, the reviewing court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the defendant, rather than testing the voluntariness of his plea according to whether a ritualistic litany of the formal legal elements of the offenses was read to him.

There are three ways that the record of a plea or admission can serve as satisfactory evidence that the defendant had the requisite knowledge of the elements of the charge: 1) the judge can explain the elements of the crime; 2) counsel may represent that he or she has explained them to the defendant; or, 3) the defendant may admit or stipulate to facts

constituting the elements. See *Commonwealth v. Colantoni*, 396 Mass. 672, 679 (1986). The defendant's signature on a form that he or she is aware of the elements of the charge is not sufficient. See *Commonwealth v. Jones*, 60 Mass. App. Ct. 88 (2003).

While in a post-conviction context it may suffice for the record to reflect that counsel stated that the defendant was advised of the elements, or for the defendant to have admitted an act constituting the elements, the judge should not rely on these means as the primary method of establishing the requisite knowledge. See *Colantoni*, *supra*, 396 Mass. at 679 n. 5. The best way to ensure that the defendant knows the elements of the crime is for the judge to explain them as part of the colloquy. This can be fairly easily done in most cases by reading to the defendant the indictment or complaint. However, in some cases, it may require more than a simple statement of the crime itself. E.g. *Commonwealth v. Jones*, 60 Mass. App. Ct. 88 (2003) (simply telling the defendant that he is charged with assault and battery does not sufficiently apprise him of the elements of the crime); *Commonwealth v. Pixley*, 48 Mass. App. Ct. 917 (2000) (telling the defendant only that he was charged with possession of cocaine with intent to distribute did not satisfy requirement of explaining the elements as mandated by this subsection).

For an example of the scope of the examination conducted to satisfy the Boykin requirement of an affirmative showing of understanding and voluntariness, see *Commonwealth v. Taylor*, 370 Mass. 141, 144-45 n. 5 (1976). In conducting the examination, the judge is to rely on his or her own observations and discernment in concluding that the defendant understands the questions. See *Commonwealth v. Leate*, 367 Mass. 689, 696 (1975).

In order for the plea or admission to be voluntary, the defendant's decision to waive a trial must be free from the influence of factors that have no legitimate role to play in the process. See *Rossman, Guilty Pleas*, 2 Criminal Law Advocacy, ¶ 2.03 (listing improper threats, such as physical abuse). Therefore, the judge should inquire whether the defendant's decision to waive a trial is a result of any threats or inducements apart from those identified in the plea agreement. See *Commonwealth v. Fernandes*, 390 Mass. 714, 719 (1984). While no particular form of words need be used to make this inquiry, see *Commonwealth v. Lewis*, 399 Mass. 761, 764 (1987), a brief colloquy that does not probe the defendant's mind will not do. See *Commonwealth v. Quinones*, 414 Mass. 423, 434 (1992); *Fernandes*, *supra*, 390 Mass. at 717-719. It is useful, however, for the judge to include in the colloquy a question about whether the defendant has consulted with counsel about the decision to waive a trial and is satisfied with counsel's assistance. Cf. *Fernandes*, *supra*, 390 Mass. at 718.



The pressure of a plea bargain that holds out no more than the possibility of a harsher sentence if the defendant goes to trial and is convicted is not by itself an improper influence that would render a guilty plea not voluntary. See *Commonwealth v. Tirrell*, 382 Mass 502, 510 (1981):

*neither this court nor the Supreme Court has required total absence of psychological or emotional pressure. In any plea bargaining situation the defendant is necessarily put to a difficult choice—the risk of a more serious sentence after trial and conviction against the probabilities of the trial judge's accepting the prosecutor's recommended leniency. The defendant's fond hopes for acquittal must be tempered by his understanding of the strength of the case against him, his prior record, and the completely unknowable reaction of the trier of fact. See Commonwealth v. Leate, 367 Mass. 689, 694 (1975). Without some showing of peculiar susceptibility, which rendered the defendant so gripped by fear of the ... penalty or hope of leniency that he ... could not ... rationally weigh the advantages of going to trial against the advantages of pleading guilty," Brady v. United States, 397 U.S. 742, 750 (1970). We cannot say that the pressure of the decision per se destroys voluntariness. Contrast Pate v. Robinson, 383 U.S. 375, 385-386 (1966) (record of irrational conduct required hearing on defendant's incompetency to stand trial).*

**(c)(5)(A)**

This subdivision is based upon A.B.A. Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968) and accords with District Court Initial R. Crim. P. 5 (1971). See Fed. R. Crim. P. 11(f).

The “factual basis” standard can be met by having the prosecutor state for the record the evidence that the Commonwealth would have presented had the case gone to trial. In addition, the court may require sworn testimony from a prosecution witness or of the defendant. See 8 J. Moore, Federal Practice ¶ 11.03 [3] at 11-75 (1978); A.B.A. Standards Relating to Pleas of Guilty § 1.6, comment at 32 (Approved Draft, 1968).

*North Carolina v. Alford*, 400 U.S. 25 (1970), establishes that the United States Constitution does not prohibit the court from accepting a guilty plea from a defendant who nevertheless asserts his or her innocence. An Alford plea is a permissible way to establish a defendant's guilt without a trial. See *Commonwealth v. Nikas*, 431 Mass. 453 (2000); *Hout v. Commonwealth*, 363 Mass. 91 (1973). “Under Alford, a defendant who professes innocence may nevertheless plead guilty and ‘voluntarily, knowingly and understandingly consent to the imposition of a prison sentence,’ if the State can demonstrate a ‘strong factual basis’ for the plea.” *Commonwealth v. DelVerde*, 398 Mass. 288, 297(1986), quoting

North Carolina v. Alford, 400 U.S. 25, 38 (1970). If a factual basis for such a plea exists, it is only fair to allow a defendant who is aware of the law, the facts, and the consequences of his plea, to attempt to reduce the severity of his or her punishment by pleading guilty. See Commonwealth v. Hubbard, 371 Mass. 160 (1976). The defendant is free to weigh the strength of the Commonwealth's evidence and on this basis to waive the right to trial. If the waiver is voluntary and intelligent it should be upheld.

Subdivision (c)(5)(A) is not made applicable to nolo pleas. The purpose of permitting a nolo plea is to relieve the defendant of the adverse repercussions that can result from the introduction of evidence from the present criminal proceedings. This purpose would be undermined to the extent that disclosures led to subsequent civil proceedings or evidence to be used at such proceedings, notwithstanding the fact that the disclosures themselves could not be used in evidence. The Federal Rules Advisory Committee stated in its note to Fed. R. Crim. P. 11: "it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea."

**(c)(5)(B)**

At the conclusion of the hearing, if the judge finds that the plea "is the defendant's own, guided by reasonable advice of his counsel, his own knowledge of what he has done, and a fair understanding of the alternatives," it will be considered voluntary. Commonwealth v. Manning, 367 Mass 699, 706 (1975). The judge may then accept the plea or, notwithstanding the fact that it is voluntary, reject it. See subdivision (c)(6), *infra*.

**(c)(5)(C)**

If the plea or admission is accepted, the judge shall proceed with sentencing as after a verdict or finding of guilty under Mass. R. Crim. P. 28(b).

**(c)(6)**

This subdivision is drawn in part from Fed. R. Crim. P. 11(e)(3)-(4) and from A.B.A. Standards Relating to Pleas of Guilty § 2.1 (Approved Draft, 1968). See Rules of Criminal Procedure (U.L.A.) rule 444(e) (1974). Compare Fed. R. Crim. P. 32(d) (plea may be withdrawn after sentence only "to correct manifest injustice") with A.L.I. Model Code of Pre-Arrestment Procedure § 350.6 (POD 1975) (defendant may withdraw plea if sentence to be imposed is more severe than that provided in plea agreement).

Previously existing statutes relative to the withdrawal of pleas after imposition of sentence are intended to be unaffected by this rule. General Laws c. 278 §§ 29A (St 1962, c 310, § 2) and 29C (St 1959, c 167, § 1) permitted the retraction of any sentence and the withdrawal of any plea upon which the sentence was imposed within sixty days of sentencing if justice has not been done. Now see Mass. R. Crim. P. 29. In a case where the defendant has the

right to counsel and is neither represented nor validly waived counsel, General Laws c. 278, § 29B grants the defendant an absolute right to withdraw a plea prior to sentencing.

This subdivision addresses two classes of cases. One is where the defendant's plea or admission is contingent upon a prosecutor's sentence recommendation. The other, referred to in language added in 2004, occurs where the defendant has tendered a defense capped plea. In either case, the judge has many available options. After reviewing the arrangement and, if desired, the probation report, the judge may concur in the disposition; concur in the disposition, but condition the concurrence upon facts being found consistent with representations made by the parties; refuse to accept the disposition; or propose an alternative disposition, giving the defendant a reasonable opportunity to consider the alternative before deciding whether to persist in the plea or admission or proceed to trial. If the judge intends to vary from the recommended or tendered disposition in a manner which is detrimental or prejudicial to the interests of the defendant, the defendant has an absolute right to withdraw the plea or admission.

It should be noted that where a plea or admission is predicated on a promise by the prosecutor to take unilateral action over which the judge has no control, such as entering a nolle prosequi to certain charges, this subsection is not applicable. The “[p]ower to enter a nolle prosequi is absolute in the prosecuting officer ... except possibly in instances of scandalous abuse of the authority.” *Commonwealth v. Dascalakis*, 246 Mass. 12, 18 (1923). See Mass. R. Crim. P. 16. In a case such as this, disclosure to the court prior to the tender of the plea serves no purpose other than determining whether the plea is knowingly and voluntarily made.

While this subdivision is the only provision in Rule 12 that explicitly addresses the issue of a defendant's withdrawing a plea, a judge has authority to entertain such a motion on other grounds. Prior to its amendment in 1987, Rule (c)(2)(B) contained an explicit statement that if the defendant persisted in pleading guilty despite notice of the judge's intention to exceed the prosecutor's recommended sentence, the defendant could not thereafter withdraw the plea except “in the discretion of the judge.” This provision was eliminated in 1987. The former subsection (c)(2)(B) gave the judge “broad discretion to allow a defendant to withdraw [a] plea before ... sentence [has been] imposed.” *Commonwealth v. DeMarco*, 387 Mass. 481, 484 (1982); see also *Commonwealth v. Clerico*, 35 Mass. App. Ct. 407, 413 n. 7(1991). The removal from Rule 12 of the reference to a judge's discretion to allow the defendant to withdraw a plea does not alter the law that otherwise controls in this situation. If the defendant can show that the plea was not voluntary or tendered knowingly, then a motion for withdrawal should be granted, for these requirements are constitutional prerequisites to the validity of the plea. If, on the other hand, the defendant seeks to

withdraw a plea prior to sentencing despite its being knowing and voluntary, the judge should balance the reason put forward by the defendant against any prejudice to the Commonwealth. Cf. *Commonwealth v. Nolan*, 19 Mass. App. Ct. 491, 494 (1984). After sentencing, however, the proper vehicle to seek to withdraw a guilty plea is a motion under Rule 30 (b).

The 2004 revision of Rule 12 deleted subdivision (d), which was designed to discourage the practice of “judge shopping” by tendering, withdrawing, and retendering a guilty plea until a judge is found who will agree to the disposition favored by the defendant. A uniform policy on whether a defendant may ask more than one judge to accept a sentence recommendation or defense capped plea is unnecessary. Individual judges still retain the discretion to refuse to entertain such requests.

### [Subdivision] (e)

The conditions governing the availability to the defendant of the probation report are the same as those which control under Mass. R. Crim. P. 28(d)(3). It is important for the defendant to have access to this information so that he or she can more effectively bargain with the prosecutor and more accurately predict how the court will react to proposed dispositions. The judge need not always view the probation report to properly decide whether it should be released to the defendant. The judge can rely on representations made by the probation department or by the prosecutor in reaching this decision. The judge may examine the defendant's criminal record before accepting a plea or admission. See *Commonwealth v. Whitford*, 16 Mass. App. Ct. 448, 453 (1983).

### Subdivision (f)

In its original form, this subdivision changed the prior rule in Massachusetts that a plea that has been withdrawn may be introduced in subsequent proceedings as an admission by the defendant. See *Morrissey v. Powell*, 304 Mass. 268 (1939). The current position reflected in this subdivision is consistent with the modern trend and with the rule in federal courts. See A.B.A. Standards Relating to Pleas of Guilty, §§ 2.2, 3.4 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 444(f) (1974); A.L.I. Model Code of Pre-Arrestment Procedure § 350.7 (POD 1975). It is drawn from Fed. Cr. Crim. P. 11(e)(6), although it is broader in scope, since unlike the federal rule, its application to statements made in the course of plea negotiations is not limited only to circumstances where the defendant is negotiating with a government attorney. See *Commonwealth v. Wilson*, 430 Mass. 440, 443 (1999). However, simply expressing a desire to plead guilty to a police officer who does not have any authority to bind the Commonwealth does not bring a defendant's statement within the scope of this subdivision. *Id.*

In 2004, the subdivision was amended to include admissions to sufficient facts among the category of actions by the defendant that are not admissible if later withdrawn.

Permitting a prosecutor to offer evidence that a defendant unsuccessfully tendered a plea or admission undermines the rationale behind the decision allowing the plea or admission to be withdrawn in the first place. See *Kercheval v. United States*, 274 U.S. 220 (1927).

Additionally, juries tend to give undue weight to the introduction of prior pleas. Of course, if the reason why the plea or admission was withdrawn was that it was not knowing and voluntary, then the federal Constitution prohibits its use in a subsequent proceeding. Cf. *White v. Maryland*, 373 U.S. 59 (1963) (barring use of evidence that the defendant had entered a guilty plea without the assistance of counsel, where the defendant did not validly waive the right to counsel).

While an offer to plead guilty is inadmissible pursuant to this subdivision, the fact that a defendant refused to enter a guilty plea or rejected a plea agreement is not, conversely, admissible by implication. See *Commonwealth v. DoVale*, 57 Mass. App. Ct. 657 (2003).

## Rule 13: Pretrial Motions

(Applicable to cases initiated on or after September 7, 2004)

### (a) In General

#### *(1) Requirement of Writing and Signature; Waiver*

A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

#### *(2) Grounds and Affidavit*

A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

### *(3) Service and Notice*

A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

### *(4) Memoranda of Law*

The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

### *(5) Renewal*

Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

## **(b) Bill of Particulars**

### *(1) Motion*

Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

### *(2) Amendment*

If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

## (c) Motion to Dismiss or to Grant Appropriate Relief

### (1)

All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

### (2)

A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

## (d) Filing

Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

### (1) *Discovery Motions*

Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

### (2) *Non-discovery Pretrial Motions*

A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

## (e) Hearing on Motions

The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

## *(1) Discovery Motions*

All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

## *(2) Non-Discovery Pretrial Motions*

A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

## *(3)*

Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

## Rule History

*Amended March 8, 2004, effective September 7, 2004.*

## Reporter's Notes

### *(2004, Revised)*

This rule establishes the form of, and manner for the presentation of, pretrial motions. Not every motion that is made in a pretrial posture is governed exclusively by this rule. For example, a continuance motion is subject to the provisions of Rule 10(a)(3) and (4), and the requirements of a motion for relief from prejudicial joinder are contained in Rule 9(d). Where, however, no other rules or statutes provide otherwise, pretrial motions should be made in conformity with the provisions of this rule.



The primary sources of this rule as originally formulated are Rule 3.190 of the Florida Rules of Criminal Procedure (1974) and the existing statutory law of the Commonwealth. The rule has an abbreviated counterpart in Rule 47 of the Federal Rules of Criminal Procedure. In 2004 the rule was revised with regard to its provisions governing filing, filing deadlines, and hearings. The formal requirements concerning motions, affidavits, supporting memoranda, service and notice were unchanged in all respects. So too were the specific provisions in 13(b) and 13(c) concerning bills of particulars and motions to dismiss respectively.

## Subdivision (a)

Motions in general. This subdivision is derived in large part from the Florida Rule, but essentially restates existing practice and is supported in large part by Rule 9 of the Superior Court Rules (1974). The references to pretrial motions are to include pleadings in response to a motion where such exist.

Subdivision (a)(1) requires a pretrial motion to be in writing. Although an oral motion may be considered, *Commonwealth v. Geoghegan*, 12 Mass. App. Ct. 575, 575-76 (1981), it need not be because it violates this requirement. *Commonwealth v. Pope*, 392 Mass. 493, 498 n. 8 (1984).

Subdivision (a)(2) is taken from Rules 9 and 61 of the Superior Court Rules (1974). The requirement of an affidavit in support of factual assertions is supported additionally by former G.L. c. 277, § 74. (RS [1836] c 136, § 31). The affidavit need not be signed by the defendant but must be signed by someone with personal knowledge of the facts therein, see *Commonwealth v. Santosuosso*, 23 Mass. App. Ct. 310 (1986) (affidavit by counsel), except for those affidavits accompanying a motion requesting a summons for the production of documentary evidence and objects, see *Commonwealth v. Lampron*, 441 Mass. 265, 270-71 (2004) (an affidavit accompanying a motion requesting a summons for production of documentary evidence or objects may be based on hearsay from a reliable source, which the affidavit must identify).

The reference in subdivision (a)(3) to opposing affidavits is to apply only if there are opposing affidavits. It is not intended to require them.

Subdivision (a)(4) is taken from Rule 9 of the Superior Court Rules (1974).

Subdivision (a)(5) provides that although a motion has been once heard and denied, it may be renewed if “substantial justice requires” that action. This is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed. See (a)(2), *supra*. Moreover, at times it may be necessary to renew a motion in order to preserve it for appeal. For example, the Supreme Judicial Court

has held that a suppression motion was waived when counsel failed to renew it at the time the evidence was offered at trial. *Commonwealth v. Acosta*, 416 Mass. 279 (1993).

## Subdivision (b)

Bill of Particulars. Former G.L. c. 277, § 40 (St 1887, c 436, § 2) permitted the court to require the prosecution to file particulars in order to more fully apprise the defendant or the court of the nature of the charges. This subdivision incorporates that practice into this rule.

The distinction which was drawn in the statute between particulars ordered by a court with jurisdiction over the offense charged and those ordered by a court without jurisdiction of the offense charged has not been retained in this rule. However, the judge may in his discretion order whatever particulars he deems necessary under the circumstances, and this would permit him to order a more complete statement of particulars where it is required in the interests of justice. Indeed, particulars may be constitutionally required in some cases under article 12 of the Massachusetts Declaration of Rights, which protects a defendant from having to answer charges “until the same is fully and plainly, substantially and formally, described to him.” See also *Commonwealth v. Baker*, 368 Mass. 58, 77 (1975) (suggesting a liberal standard for granting particulars).

If the specifications supplied in conformity with the court’s order are irrelevant or prejudicial, defense counsel must file a motion to strike those deemed improper. 30 Mass. Practice Series (Smith) § 1296 (1983).

Although the rule requires motions for bills of particulars to be made before trial, it is not intended to be construed so as to limit the inherent power of the court in an appropriate situation to order a bill at any time.

## Subdivision (c)

Motions to Dismiss or Grant Appropriate Relief. This is a restatement of former G.L. c. 277, § 47A (St 1965, c 617, § 1). It should be noted that G.L. c. 277, § 47A abolished at least in name all the other pleas, demurrers, challenges, and motions to quash; it effectively consolidated all of them under the general heading of a motion to dismiss or grant appropriate relief, in effect retaining the statutory and common law of the Commonwealth governing such pleas. Section 47A (as amended) now provides for relief from the waiver of defenses not timely raised, upon a showing of cause.

*In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised prior to trial and only by a motion in conformity with the requirements of the Massachusetts Rules of*

*Criminal Procedure. The failure to raise any such defense or objection by motion prior to trial shall constitute a waiver thereof, but a judge or special magistrate may, for cause shown, grant relief from such waiver. A defense or objection based upon a failure to show jurisdiction in the court or the failure to charge an offense may be raised by motion to dismiss prior to trial, but shall be noticed by the court at any time.*

Id. See also *Commonwealth v. Chou*, 433 Mass. 229 (2001). “Cause” should be read to include grounds of which the moving party was not previously aware. See Mass. R. Crim. P. 46(b); *Commonwealth v. Bongarzone*, 390 Mass. 326, 337-38 (1983). Additionally, case law and statutory law establish that certain motions and objections must be heard even if raised for the first time at trial, such as claims that the complaint or indictment fails to state a charge, or is outside the court’s jurisdiction, G.L. c. 277, s. 47A and *Commonwealth v. Cantres*, 405 Mass. 238, 239-40 (1989); that wiretap evidence should be suppressed, *Commonwealth v. Picardi*, 401 Mass. 1008 (1988); that a statement was taken in violation of the Miranda rule, *Commonwealth v. Adams*, 389 Mass. 265, 269-70 & n. 1 (1983); or that the defendant was not criminally responsible by reason of insanity, Mass. R. Crim. P. 14(b)(2).

## Subdivision (d)

Filing motions. This subdivision sets out the filing deadlines for pretrial motions. It was amended in 2004 to eliminate provisions relating to filing motions in the now-abolished de novo district court system, and to remove a conflict between this rule and the statutory filing deadlines subsequently established for district courts by the single-trial legislation, G.L. c. 278, § 18.

Under subdivision (d)(1), discovery motions are to be filed prior to the conclusion of the pretrial hearing, or after for good cause shown. The subdivision also specifies two specific, non-exhaustive circumstances which shall be deemed to constitute good cause. One self-evident basis is that the discovery sought could not reasonably have been requested or obtained prior to the pretrial hearing [(d)(1)(A)]. The other, specified in (d)(1)(B), allows later filing by the Commonwealth if it “could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing.” This asymmetrical provision is necessary because under the rules, the Commonwealth must fulfill its discovery obligations in order to receive discovery. If the Commonwealth has been unable to provide discovery prior to the pretrial hearing for good reason, it should not be prejudiced by having its reciprocal discovery rights foreclosed. Provision 13(d)(1)(ii) is necessary to preserve the Commonwealth’s discovery rights in such a situation. In any event, with the institution in

2004 of automatic and comprehensive discovery without motion under Rule 14, motions for discovery should be unnecessary in many cases.

Under subdivision (d)(2), non-discovery pretrial motions are to be filed no later than 21 days after the court's assignment of a trial date or trial assignment date, unless the court permits later filing for good cause shown. (Additionally, the defendant must also provide notice of intent to defend by reason of insanity, or by reason of license or privilege, within this time period. Rule 14(b)(2) and (3), respectively). In effect, this provides 21 days after the pretrial hearing or compliance hearing, whichever is later, since under Rule 11 it is there that the trial date or trial assignment date must be set (and, in district court, a jury election or waiver must be taken, the event that commences the 21-day deadline for motions mandated by the district court single trial legislation). The time limits provided in this rule for the filing of pretrial motions are intended to set the norm. Ample opportunity is left for the court to exercise its discretion in the interest of justice, however, by the inclusion of the "for cause shown" provision in subdivisions (d)(1) and (d)(2). See also *Commonwealth v. Bongarzone*, *supra*.

A clerk is not generally empowered to refuse to accept and docket a motion without the court's express approval, but if this occurs counsel may move to have the motion docketed. *Bolton v. Commonwealth*, 407 Mass. 1003, 1003-4 (1990).

Subdivision (d) also makes explicit what is already implicit in Mass. R. Crim. P. 11, namely, that the only pretrial motions which may be filed are those as to the substance of which counsel were unable to agree. Counsel should ascertain whether the opposing party or parties will agree to all potential motions before or during the pretrial conference (or, if the motion could not have been anticipated until after the pretrial conference, promptly when the need for the motion becomes apparent). By requiring that the substance of any pretrial motions a party intends to file be discussed with the adverse party, this subdivision institutes a rule of judicial economy. It is contemplated that having parties compare all the motions they intend to file before trial at the pretrial conference will make the conference more productive by eliminating many "boiler plate" motions. If a conflict between this subdivision and the general filing and service of papers provisions of Rule 32 should arise, this subdivision is controlling as to motions to which it is applicable.

## Subdivision (e)

This subdivision provides the parties with a right to a hearing on a pretrial motion, and governs the scheduling of the hearing. Subdivision (e)(3) provides that within seven days of filing (or if the motion is transmitted to the trial session within seven days after the transmittal), the clerk should schedule the motion for hearing. However, the clerk will be

guided by other provisions in subdivision (e). First, the court must afford the opposing party an adequate opportunity to prepare and submit a memorandum prior to the hearing. Second, discovery motions must be heard and decided prior to the defendant's election of a jury or jury waived trial; if any discovery motions are pending at the time of the pretrial hearing or the compliance hearing, they should be heard at that time [(e)(1)]. See Rule 11(b)(2)(iii) and (c)(3); Dist./Mun. Ct. Rule of Criminal Procedure 4(e). Third, non-discovery motions may be scheduled to be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session, although the default date for motions filed at the pretrial hearing is the next scheduled court date [(e)(2)]. The clerk must notify the parties of the date assigned. This provision allows individual courts to decide how to schedule non-discovery motions. Finally, subdivision (e)(3) provides a method for the parties to agree to a mutually convenient time for hearing when the motion is filed.

Although not enumerated in the rule, precedent establishes that some motions may be heard *ex parte*, especially when they do not affect an interest of the opposing party or would reveal privileged or other information to which the opposing party is not entitled. For example, motions to fund indigent expenses need not be heard in the presence of the prosecution. *Commonwealth v. Dotson*, 402 Mass. 185, 187 (1988); *Commonwealth v. Haggerty*, 400 Mass. 437, 441 (1987).

## Rule 14: Pretrial Discovery from the Prosecution

### (a) The Prosecutor's Obligations

#### *(1) The Prosecution Team*

For the purposes of this rule, the prosecution team includes all persons under the prosecuting office's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecuting office or have done so in the case. The prosecution team includes but is not limited to:

- (A) Personnel of police departments or other law enforcement agencies who were or are involved in the investigation of the case, before or after charges were issued, or were or are involved in the prosecution of the case;
- (B) Personnel of other governmental agencies who, in conjunction or collaboration with the prosecutor, were or are involved in the investigation or prosecution of the case;

- (C) Forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government who were or are involved in the investigation or prosecution of the case;
- (D) Victim witness advocates and investigators employed by the prosecuting office; and
- (E) Members of joint state and federal law enforcement task forces who were or are involved in the investigation or prosecution of the case.

## *(2) The Prosecutor's Duties to Inform and Inquire, Collect and Disclose, Preserve and Notify, and Record*

### **(A)**

The prosecutor has a duty in each case to inform each member of the prosecution team whom the prosecutor has reason to believe may be in possession of items or information subject to this rule of the discovery and preservation obligations required by this rule, and to inquire of each such person as to the existence of any such items or information.

### **(B)**

The prosecutor has a duty in each case to collect and to disclose to the defense all items and information required by this rule that are in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team.

### **(C)**

When the prosecutor learns of items or information subject to disclosure which cannot be promptly copied or made available for inspection by the defense, the prosecutor has a duty to promptly notify the defense of the existence, and if known the location, of those items or information, and to instruct an appropriate member of the prosecution team to preserve those items or information until they can be disclosed.

### **(D)**

When the prosecutor learns of items subject to disclosure that have been destroyed, lost, altered, or which have otherwise become unavailable, or items or information subject to disclosure that a member of the team will not provide the prosecutor, the prosecutor has a duty to promptly notify the defense of the destruction, loss, alteration, or unavailability of the items or the refusal to provide the items or information.

### **(E)**

The judge may inquire of the prosecutor what actions were taken to achieve compliance with this rule.

## (b) Materials Subject to Automatic Discovery.

### *(1) Investigative Materials*

The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, each of the following items and information, provided it is relevant to the case and in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team:

- (A) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
- (B) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
- (C) The names, addresses, dates of birth, and known contact information of the Commonwealth's prospective witnesses other than law enforcement witnesses.
- (D) Written or recorded statements of persons the prosecutor may call as witnesses, and notes of interviews by law enforcement with persons the prosecutor may call as witnesses, unless contained within a disclosed statement or report.
- (E) The names, business telephone numbers, business email addresses, and business addresses of prospective law enforcement witnesses.
- (F) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to Rule 14.4. Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.
- (G) All photographs, video and audio recordings, or other tangible objects, all police or investigator's reports, and all intended exhibits.
- (H) Reports of physical examinations of any person or of scientific tests or experiments.
- (I) A summary of identification procedures, and all written, recorded, or oral statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

### *(2) Items and Information Favorable to the Defense*

#### *(A) Scope*

The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, all items and information favorable to the defense in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team. Items and information subject to this section must be disclosed without regard to whether

the prosecutor considers the items or information credible, reliable, or admissible and without regard to whether any such information has been reduced to tangible form. The disclosure of any unwritten or intangible information shall be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.

## (B) Definition

Items and information favorable to the defense are items or information that tend to:

- (i) Cast doubt on an aspect of guilt as to an element of any count of a charged or lesser included offense;
- (ii) Cast doubt on the credibility or accuracy of any evidence, including identification or scientific evidence, the prosecutor may introduce;
- (iii) Cast doubt on the credibility of the testimony of any witness the prosecutor may call;
- (iv) Cast doubt on the admissibility of any evidence or testimony the prosecutor may introduce;
- (v) Support the suppression or exclusion of any evidence or testimony the prosecutor may introduce;
- (vi) Mitigate the charged offense or offenses or any lesser included offense or offenses, diminish the defendant's culpability, or mitigate the sentence;
- (vii) Establish a defense theory or recognized affirmative defense or exemption to the charged offense or offenses or any lesser included offense or offenses, regardless of whether the defendant has presented such theory or raised such affirmative defense or exemption; or
- (viii) Corroborate the defense version of facts or call into question a material aspect of the prosecution's version of facts, even if this aspect is not an element of the prosecution's case.

## (C) Examples

Items or information favorable to the defense include but are not limited to:

- (i) With respect to any witness the prosecutor may call:
  - (a) Any promise, reward, or inducement sought, requested by, offered to, or given to such witness;
  - (b) Any criminal record of such witness not contained in the court activity record provided pursuant to Rule 14.2(b);
  - (c) Any criminal cases pending against such witness at any relevant time, whether brought by the prosecuting office or by a prosecuting office in any other jurisdiction;



- (d) Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor by the witness, that recants any written statement or oral statement known to the prosecutor by the witness, or that omits, adds, varies, or supplements any written statement or oral statement known to the prosecutor by the witness;
  - (e) Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor made by any other witness the prosecutor may call;
  - (f) Any information reflecting bias or prejudice against the defendant by such witness or which otherwise reflects bias or prejudice against any class or group of which the defendant is a member;
  - (g) Any crime, charged or uncharged, committed by such witness, if known to the prosecutor, prosecuting office, or any member of the prosecution team;
  - (h) Any information about such witness contained in any database or list of information about law enforcement misconduct maintained by or available to the prosecuting office; and
  - (i) Any information about any mental or physical impairment or condition of such witness that may cast doubt on such witness's ability to testify truthfully and accurately concerning any relevant event.
- (ii) With respect to any percipient witness, without regard to whether the prosecutor may call such witness:
- (a) The failure of the percipient witness to make an identification of a defendant, if any identification procedure has been conducted with such a witness with respect to the crime at issue;
  - (b) Any inconsistent written statement or oral statement of the percipient witness regarding the alleged incident or the conduct of the defendant; and
  - (c) Any written statement or oral statement of the percipient witness that is inconsistent with written statements or oral statements about the alleged incident made by other witnesses.
- (iii) With respect to any expert witness, other than one pertaining to the defendant's criminal responsibility subject to Rule 14.4, the prosecutor may call:
- (a) Descriptions of any examinations, tests, or experiments performed by the expert in connection with the case that were inconclusive, whose results were inconsistent with those of any examinations, tests, or experiments included in the expert's report, or whose results were inconsistent with any conclusion or opinion offered by the expert; and

- (b) Descriptions of negative outcomes of proficiency testing or audits of the expert witness or of any testing or laboratory facility used by the expert for tests or experimentation.
- (iv) With respect to any person the prosecutor does not anticipate calling:
  - (a) Any written statement or oral statement of such person, including an expert, pertaining to the case that is inconsistent with any written statement or oral statement known to the prosecutor made by a witness the prosecutor may call.
- (v) Items or information that tend to:
  - (a) Support the proposition that another person committed the crime or had the motive, intent, or opportunity to commit it;
  - (b) Establish deficiencies or lapses in the investigation of the case or the failure of any expert witness or member of the prosecution team to follow established protocols, policies, or professional standards;
  - (c) Call into doubt the authenticity of any evidence the prosecutor may introduce, or the reliability or validity of any expert testimony the prosecutor may introduce; and
  - (d) Suggest that any bias or prejudice against any class or group of which the defendant is a member played any role in the investigation or prosecution of the case.

### *(3) Statement Definitions*

#### *(A)*

The term “written statement,” as used in this rule, means:

- (i) a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or
- (ii) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing-impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

#### *(B)*

The term “oral statement,” as used in this rule, means any communication, by speech or nonverbal conduct intended as an assertion, of a person having percipient knowledge of relevant facts and which contains such facts that is not a written statement.

## (C)

If information subject to disclosure exists in statements of multiple forms, including written and oral statements, the entirety of the substance of the information must be fully and completely disclosed, even when such disclosure requires providing written documents and separately disclosing the substance of any unwritten oral statement. The disclosure of any unwritten oral statements should be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.

## (c) Timing of Discovery

Except as otherwise ordered by the court, the prosecutor shall provide the discovery required by Rule 14(b) at arraignment to the extent that the discovery is in the possession of the prosecutor. The prosecutor shall provide the discovery required by Rule 14(b) then available to the prosecution team by the first pretrial conference.

## (d) Continuing of Duty

If the prosecution team subsequently obtains possession of items or information subject to disclosure under Rule 14(b), the prosecutor shall promptly disclose to or notify the defense of its acquisition of such additional items or information in the same manner as required for initial discovery.

## Rule History

*Amended March 8, 2004, effective September 7, 2004; amended April 4, 2005, effective May 1, 2005; amended December 17, 2008, effective April 1, 2009; amended June 26, 2012, effective September 17, 2012; amended November 5, 2015, effective January 1, 2016; amended November 26, 2024, effective March 1, 2025.*

## Reporter's Notes

### (2025)

These are the first comprehensive revisions to the provisions governing pretrial discovery since 2004. They separate prior Rule 14 into five new rules (Rules 14-14.4). They make significant changes to procedures for mandatory disclosure to the defense and delineate in greater detail material subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. These changes to the procedure for ensuring disclosure of “Brady material” are in Rule 14.

Rules 14.1-14.4 reorganize the remaining discovery provisions of prior Rule 14. No substantive changes are intended in what was previously Rule 14(a)(1)(B) (Reciprocal Discovery for the Prosecution), 14(a)(1)(C) (Stay of Automatic Discovery; Sanctions), 14(a)(1)(D) (Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses), 14(a)(1)(E) (Notice and Preservation of Evidence), 14(a)(2)-(8) (Motions for Discovery, Certificate of Compliance, Continuing Duty, Work Product, Protective Orders, Amendment of Discovery Orders, and Sanctions for Noncompliance), and 14(b)(1)-(4) (Notice of Alibi, Mental Health Issues, Notice of Other Defenses, and Self Defense and First Aggressor).

The prior discovery provisions of Rule 14 have been reorganized into five new rules as follows:

- Rule 14 Pretrial Discovery from the Prosecution [Replaces Rules 14(a)(1)(A), 14(a)(1)(E)(i), and 14(d)]
- Rule 14.1 Pretrial Reciprocal Discovery from the Defense [Replaces prior Rule 14(a)(1)(B)]
- Rule 14.2 Pretrial Discovery Procedures [Replaces prior Rules 14(a)(1)(C), 14(a)(1)(D), 14(a)(1)(E)(ii), 14(a)(2)-(8), and 14(c)]
- Rule 14.3 Pretrial Discovery of Affirmative Defense; Self Defense and First Aggressor [Replaces prior Rules 14(b)(1), 14(b)(3), and 14(b)(4)]
- Rule 14.4 Pretrial Discovery of Mental Health Issues [Replaces prior Rule 14(b)(2)]

## Rule 14 Pretrial Discovery from the Prosecution

*[This is a new section.]*

The prosecutor's discovery obligation stems from three sources: the Massachusetts Rules of Criminal Procedure (specifically Mass. R. Crim. P. 14-14.4), the Massachusetts Rules of Professional Conduct, and the due process clauses of the Federal and State constitutions. *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700 (2018) (CPCS v. AG); *Commonwealth v. Ayala*, 481 Mass. 46, 56 (2018). Mass. R. Crim. P. 14 governs automatic discovery from the prosecution, that is, discovery that requires no request by the defense. Automatic discovery from the defense is governed by Rule 14.1. Discovery by motion is governed by Rule 14.2(d). Production of documentary evidence and material from witnesses may also be available under Rule 17(a)(2).

Rule 14 was created in response to the Supreme Judicial Court's decision in *CPCS v. AG*, in which it directed the Standing Advisory Committee to develop a checklist of exculpatory evidence that would clarify the definition of material subject to disclosure and provide detailed guidance to practitioners, as has been done in several federal district courts by

local rules. 480 Mass. at 732-733. See Rule 5.1, Rules of the United States District Court for the District of Columbia (eff. September 2015; updated July 2019) (Disclosure of Information); Rule 26.2, Local Rules of the United States District Court for the Northern District of Florida (eff. Nov. 24, 2015) (Discovery in Criminal Cases); Rule 88.10, Local Rules of the United States District Court for the Southern District of Florida (rev. Dec. 1, 2017) (Criminal Discovery); Rule 116.2, Local Rules of the United States District Court for the District of Massachusetts (eff. June 1, 2018) (Disclosure of Exculpatory Evidence).

The use of a written “Brady checklist,” provided to both the prosecution and defense, and “delineating in detail the general disclosure obligations of the prosecution under Brady and its progeny and applicable ethical standards,” has been endorsed by the American Bar Association since 2011. American Bar Association, Resolution 104A Revised (adopted February 14, 2011). ABA Journal, Criminal Courts Should Provide a Brady Checklist.

While a checklist can reduce the risk that a prosecutor inadvertently does not find exculpatory material or does not recognize it as subject to disclosure, the case-specific nature of exculpatory evidence means a checklist is not a panacea. Because “no checklist can exhaust all potential sources of exculpatory evidence” the Court also directed the Committee to consider whether identifying categories of exculpatory material—either those used in these local rules or other categories—would better ensure complete and timely disclosure of Brady material. *CPCS v. AG*, 480 Mass. at 733.

The Committee responded to the Court’s directive in three ways. First, it modernized the language for materials subject to disclosure under Brady and its progeny by using the simpler description of materials “favorable to the defense” in lieu of “facts of an exculpatory nature.” Rule 14(b)(2)(A). This is consistent with modern rules of procedure that implement Brady. Because the identification of material subject to disclosure under Brady requires a prosecutor to avoid any considerations as an advocate, the description explicitly eliminates several bases for withholding items based on their estimated or perceived effect on the litigation. Rule 14(b)(2)(A). Second, it created a functional definition of eight specific ways in which items or information can be “favorable to the defense.” Rule 14(b)(2)(B). Finally, it provided a non-exhaustive list of examples of items and information favorable to the defense. Rule 14(b)(2)(C).

Rule 14 sets forth the prosecutor’s discovery obligations in section 14(a) and defines the materials subject to automatic discovery in section 14(b). There are two basic types of materials subject to automatic discovery. First, “Investigative Materials” are items and information, other than exculpatory material, that were previously subject to mandatory discovery. These are defined in section 14(b)(1). Second, “Items and Information favorable

to the Defense” are those items and information that form the expanded definition of exculpatory material. These are defined in section 14(b)(2).

## Section 14(a). The Prosecutor’s Obligations

[This is a new section.]

Rule 14(a) sets forth the prosecutor’s duties to collect and disclose information, defines the persons from whom and entities from which the prosecutor must seek this information, and specifies the duration of these duties. These obligations arise from the prosecutor’s “core duty to administer justice fairly.” *CPCS v. AG*, 480 Mass. 700, 730 (2018) (internal citations omitted). Under both the Federal and the Massachusetts constitutions, due process requires that the prosecutor disclose evidence favorable to the defendant where the evidence relates either to guilt or to punishment. *Brady*, 373 U.S. at 87; *Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978).

Prosecutors in the Commonwealth have disclosure obligations exceeding those required by the Federal and state constitutions. Massachusetts “prosecutors have more than a constitutional duty to disclose exculpatory information; they also have a broad duty under [the Rules of Criminal Procedure] to disclose ‘[a]ny facts of an exculpatory nature.’ This duty is not limited to information so important that its disclosure would create a reasonable doubt that otherwise would not exist; it includes all information that would ‘tend to’ indicate that the defendant might not be guilty or ‘tend to’ show that a lesser conviction or sentence would be appropriate.” In the Matter of a Grand Jury Investigation, 485 Mass. 641, 649 (2020) (Matter of a Grand Jury Investigation) (Holding that immunized grand jury testimony from police officers admitting falsification of use-of-force reports to protect a fellow officer who used excessive force was exculpatory, and that it had to be revealed to defendants in unrelated cases in which the testifying officers were potential witnesses or had prepared reports.).

Because these disclosure obligations extend to information in possession of persons who “participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to [the prosecutor’s] office,” *Commonwealth v. Daye*, 411 Mass. 719, 734 (1992), they impose on the prosecutor a “duty to inquire” of prosecution team members whether they have information subject to disclosure, unless the prosecutor has no reason to believe that a particular team member may have such information. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *Commonwealth v. Martin*, 427 Mass. 816, 823 (1998). The prosecution’s duty to disclose exculpatory information to defendants “walks hand in hand with its duty to inquire about such information.” *Graham v. Dist. Attorney for Hampden District*, 493 Mass. 348, 367 (2024).

“Reasonableness’ is the only limitation on the prosecutor’s duty of inquiry.”  
Commonwealth v. Frith, 458 Mass. 434, 440-41 (2010).

These obligations are also ethical duties arising from the prosecutor’s position as a lawyer and as a lawyer who may be supervising nonlawyers. Rule 3.8(d), Mass. R. Prof. C. (Special Responsibilities of a Prosecutor), Rule 5.3(b), Mass. R. Prof. C. (Responsibilities Regarding Nonlawyer Assistance); see also Commonwealth v. Bing Sial Liang, 434 Mass. 131, 136 n.8 (2001). When police officers act as prosecutors, they are subject to the same disclosure obligations. Commonwealth v. Light, 394 Mass. 112, 114 (1985) (citing Commonwealth v. Redding, 382 Mass. 154, 157 (1980); “The police, acting as prosecutors, are held to the same prosecutorial standard concerning the disclosure of exculpatory evidence as are lawyer prosecutors.”).

### **Section 14(a)(1)**

*[This is a new section.]*

Section 14(a)(1) adds to the rule the term “prosecution team.” The prosecution team consists of those persons whose possession of information is, for discovery purposes, imputed to the prosecutor. Graham, 493 Mass. at 361-362 (“A prosecutor’s duty to disclose extends to all facts within the ‘possession, custody, or control’ of a member of the prosecution team.”). See also Bing Sial Liang, 434 Mass. at 135 (describing the work that victim-witness “advocates perform as part of the prosecution team” in holding prosecutor’s discovery obligations extend to them) and Commonwealth v. Beal, 429 Mass. 530, 532 (1999) (“the prosecutor’s duty does not extend beyond information held by agents of the prosecution team”).

The prosecutor is imputed to possess material held by two categories of persons. First, those subject to the “direction or control” of the prosecuting office are members of the prosecution team. Second, those who “participated in investigating or evaluating the case and either regularly report to the prosecuting office or did so in the case” are also members of the prosecution team. Some persons will fall within both categories. “A prosecutor’s obligations extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor’s office concerning the case. Such a person is sufficiently subject to the prosecutor’s control that the duty to disclose applies to information in that person’s possession.” Martin, 427 Mass. at 824 (citing Daye, 411 Mass. at 733, and Commonwealth v. St. Germain, 381 Mass. 256, 261 n.8 (1980)). (This rule uses the term “prosecuting office” to identify the prosecuting entity in the case and the term “prosecutor” to identify the lawyer or lawyers handling the case at any stage for that entity.)

This description of two categories of persons who are on the prosecution team comes originally from the A.B.A. Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial, 2.1(d) (Approved Draft, 1970) (“The prosecuting attorney’s obligations . . . extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.”).

First, those persons who are “under the prosecuting office’s direction or control” are team members. Persons need not be under the direction or control of the individual prosecutor handling the case to be under the prosecuting office’s direction or control. *Commonwealth v. Fossa*, 40 Mass. App. Ct. 563, 567 n.5 (1996) (The Commonwealth’s argument that non-production of police report identifying additional percipient witnesses was due to one assistant district attorney in one district court signing pretrial conference report while a different prosecutor in a different district court conducted the trial was “not a legally defensible position.”). Persons under the prosecuting office’s direction and control, then, will always be members of the prosecution team, regardless of whether they have participated in the investigation or prosecution of a particular case.

However, simply being a member of a government office, even a law enforcement office, does not thereby render a person under the prosecuting office’s direction or control. *Commonwealth v. Torres*, 479 Mass. 641, 648 (2018) (despite some overlapping and advisory responsibilities between the Attorney General and the prosecutor, Attorney General was not under direction or control of prosecutor, thus complainant’s victim compensation file held by Attorney General not subject to disclosure). Whether persons are “sufficiently subject to the prosecutor’s control that the duty to disclose applies to information in that person’s possession” turns on “practical indicia.” *Torres*, *Id.* See *Commonwealth v. Campbell*, 378 Mass. 680, 702 (1979) (in a prison homicide prosecution, the department of correction was not under the direction or control of the prosecutor despite having institutional files on inmate witnesses); *Commonwealth v. Clemente*, 452 Mass. 295, 311-312 (2008) (in a murder prosecution, State Police and federal Drug Enforcement Agency were not sufficiently subject to the prosecutor’s control to become members of the prosecution team when they investigated and interviewed a witness in an unrelated case who reported having sold drugs to one of the murder victims shortly before the killing); *Daye*, 411 Mass. at 733-734 (Boston police department was not acting jointly with the Essex County prosecutor, so its officers were not members of the prosecution team); *Commonwealth v. Thomas*, 451 Mass. 451, 454-455 (2008) (neither the State Police Colonel, who supervised the state trooper and was obligated to keep copies of the trooper’s citations and maintain audit sheets of these, nor the Registry of Motor Vehicles,



which kept required statistical data on police-issued citations, was thereby under the direction or control of the prosecutor or part of the prosecution team); *Commonwealth v. Williams*, 475 Mass. 705, 722-723 n.23 (2016) (out-of-state forensic analyst who extracted DNA from evidence before the involvement of Massachusetts police or prosecutors was not then under the control of the prosecutor). Doubts as to whether government officials, particularly law enforcement officials, who interact with the prosecuting office might be under its control, like doubts concerning the potentially exculpatory nature of information known to the prosecutor, should be resolved through disclosure. Cf. *Matter of a Grand Jury Investigation*, 485 Mass. at 650.

Second, those persons who “have participated in investigating or evaluating the case and either regularly report to the prosecutor’s office or have done so in the case” are team members. *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 n.4 (1987) (prosecutor was obligated “as a matter of law” to disclose municipal police crime laboratory report that was never in the prosecutor’s files and of which the prosecutor had no knowledge); *Commonwealth v. Woodward*, 427 Mass. 659, 679 (1998) (Legislature’s contemplation of “coordination of efforts between the medical examiner and the district attorney in investigation of deaths where criminal violence appears to have taken place” makes medical examiner one who regularly reports to the prosecuting office); *Martin*, 427 Mass. at 824 (State police crime laboratory chemist who conducted tests in the case was a member of the prosecution team); *Commonwealth v. Sullivan*, 478 Mass. 369, 380 (2017) (same); *Commonwealth v. Harwood*, 432 Mass. 290, 299-300 (2000) (“Close and coordinated relationship” between Insurance Fraud Bureau (IFB) and Attorney General’s office for purposes of investigating insurance fraud and through which IFB investigators provided “ongoing investigatory support” for Attorney General’s subsequent inquiries meant IFB’s actions were attributable to prosecutor). Contrast *Commonwealth v. Sleeper*, 435 Mass. 581, 605 (2002) (forensic director of the Bridgewater State Hospital who testified that the defendant was not suffering from a mental illness at the time of the crime and did not thereby lack criminal responsibility was not a member of the prosecution team because he testified as a private expert witness for the Commonwealth rather than in his capacity as the forensic director).

Whether a person involved in the investigation of a case is a member of the prosecutor team depends on whether “individuals [are] acting, in some capacity, as agents of the government in the investigation and prosecution of the case.” *Beal*, 429 Mass. at 531, 532-33 (complainant, an independent witness, was not converted into an agent of the prosecution through having a good working relationship with the prosecutor). See also *Commonwealth v. Ira I.*, 439 Mass. 805, 810 (2003) (middle school assistant principal who interviewed students for a school disciplinary process was not a member of the

prosecution team because doing so provided “no evidence [he] acted as an agent of the prosecution or police”). However, “individuals other than prosecutors and police may be considered agents of the prosecution team.” *Commonwealth v. Scott*, 467 Mass. 336, 349 (2014) (misconduct of chemist at state forensic drug laboratory attributable to prosecution when lab was required to perform analyses on request of law enforcement officials and chemist had reported to prosecutor’s office about the case).

Although membership on the prosecution team can depend upon the facts of the case, some persons will always be members of the prosecution team. Therefore, in addition to the definition of the prosecution team in section 14(a)(1), the rule also provides a non-exhaustive list of its members. These persons are set forth in sections 14(a)(1)(A) - (E).

#### **14(a)(1)(A)**

*[This is a new section.]*

Foremost among members of the prosecution team are personnel of police departments or other law enforcement agencies involved at any time in the investigation or prosecution of the case. *Daye*, 411 Mass. at 734. Personnel of any police department or law enforcement agency, of any jurisdiction, who were involved in any way in the investigation of a case are members of the prosecution team. Apart from the investigation, any such personnel who were or are involved at any point in the prosecution of the case are also members of the prosecution team. However, when members of law enforcement agencies who are not acting jointly with the prosecutor, or with a police department working with it, investigate separate cases they are not members of the prosecution team. *Daye*, Id. (“The ‘police’ to which that rule applies are those police who are participants in the investigation and presentation of the case.”). Even if some members of a police department participated in an investigation, this does not make all its members part of the prosecution team. *Commonwealth v. Wanis*, 426 Mass. 639, 643 (1998), and *Commonwealth v. Rodriguez*, 426 Mass. 647, 648 (1998) (police department’s internal affairs documents were not subject to mandatory discovery under Rule 14 where the officers were not “participants in the investigation and presentation of the case [or] police officers who regularly report to the prosecutor or did so in reference to a given case”); accord *Commonwealth v. Cruz*, 481 Mass. 1021 (2018) (rescript) (discovery order requiring the prosecutor to review all internal affairs records concerning an officer who submitted a search warrant affidavit was improper under Mass. R. Crim P. 14, but could be pursued under Mass. R. Crim. P. 17).

Law enforcement agencies’ personnel who are not involved in the investigation or prosecution of the case do not become members of the prosecution team simply by holding records that would be subject to disclosure were they in the prosecutor’s possession. *Campbell*, 378 Mass. at 702. Accord *Torres*, 479 Mass. at 647 (Attorney

General did not become a member of the prosecution team where there was “no indication . . . the Attorney General participated in the investigation or prosecution of the defendant [and] the district attorney does not have access to the Attorney General’s files.”).

#### **14(a)(1)(B)**

*[This is a new section.]*

Members of other government agencies may become members of the prosecution team if they were or are involved in the investigation or prosecution of the case in conjunction or collaboration with the prosecutor. Compare *Ira I.*, 439 Mass. at 810 (Middle school assistant principal who interviewed juvenile suspects did not thereby become an agent of police because he did so independently, for school disciplinary purposes, and did not disclose the juveniles’ statements to the police), and *Campbell*, 378 Mass. at 702 (Department of Correction was not part of the prosecution team in a prosecution of a prison murder, so there was no obligation to disclose institutional records of the victim and the prosecution’s inmate witness), with *Scott*, 467 Mass. at 349-350 (State chemist at then-Department of Public Health laboratory was government agent, using Rule 14 analysis to conclude she was member of the prosecution team by conducting both primary and secondary drug analyses, through her responsibility for safeguarding all evidence samples, and the expectation she would testify concerning these samples), and *Commonwealth v. Smith*, 90 Mass. App. Ct. 261, 268 (2016) (When “Norfolk district attorney, Suffolk district attorney, and the State police were communicating with each other concerning Lowe and his involvement in their various investigations” they became members of the prosecution team for the case in which Lowe was the victim and a key witness.). When agencies investigate the same events as the prosecutor for different purposes, they do not thereby become members of the prosecution team. *Commonwealth v. Adkinson*, 442 Mass. 410, 419-420 (2004) (then-Department of Social Services was not acting as an agent of the prosecutor when it denied a defense request to interview children in its custody, despite its statutorily obligated referral of abuse allegations and investigation to prosecutor under G.L. c. 119, § 51A). While most such agencies would typically be in the executive, an agency in another branch of government—such as the Probation Service—could in specific cases become a member of the prosecution team if, for example, a probation officer’s actions revealed incriminating items or information that led to a prosecution.

#### **14(a)(1)(C)**

*[This is a new section.]*

Members of the prosecution team include “forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government and involved in the investigation or prosecution of the case.” The Commonwealth’s Medical Examiner, for

example, is a member of the prosecution team where an autopsy was conducted for the case. Woodward, 427 Mass. at 679 (medical examiner regularly reports to the prosecutor where the “legislature contemplated coordination of efforts between the medical examiner and the district attorney in investigations of deaths where criminal violence appears to have taken place.”). The State Police Crime Laboratory and any municipal crime laboratories involved in the investigation or prosecution of the case, as well as private laboratories retained by law enforcement to perform analysis for the case, are also members of the prosecution team. Commonwealth v. Hallinan, 491 Mass. 730, 746 (2023) (State Police office of alcohol testing); Gallarelli, 399 Mass. at 20 n.4 (Boston Police crime laboratory); Martin, 427 Mass. at 823-24 (State Police crime laboratory); Scott, 467 Mass. at 349-350 (then-Department of Public Health drug laboratory); Commonwealth v. Ware, 471 Mass. 85, 95 (2015) (same). Team members include laboratory personnel and criminalists involved in the investigation or prosecution of the case without regard to the level of their involvement or its period in the case. Sullivan, 478 Mass. at 380-384 (state police crime laboratory criminalist who collected evidence and tested it for traces of human blood but did not conduct DNA analysis that implicated defendant was nevertheless team member).

#### **14(a)(1)(D)**

*[This is a new section.]*

Victim-witness advocates are members of the prosecution team. Bing Sial Liang, 434 Mass. at 135 (the “work of [victim-witness] advocates is subject to the same legal discovery obligations as that of prosecutors and their notes are subject to the same discovery rules”). Accord Torres, 479 Mass. at 647.

#### **14(a)(1)(E)**

*[This is a new section.]*

Members of joint state and federal law enforcement task forces that investigated the case are members of the prosecution team. Daye, 411 Mass. at 734; Commonwealth v. Lykus, 451 Mass. 310, 326-328 (2008). Whether participants in such a joint task force transform an investigation into a joint action can be a question of fact. Commonwealth v. Abdul-Alim, 91 Mass. App. Ct. 165, 169-170 (2017) (Local police officer who was a member of a joint federal-state counterterrorism task force but who arrested the defendant on a gun possession charge did not convert the prosecution into a joint action by informing his FBI task force supervisor of the defendant’s arrest or by asking defendant to become a task force informant.).

When there is sufficient cooperation between state and federal officials, the actions of federal law enforcement agencies may be imputed to the Commonwealth and impose a

duty on the prosecutor to seek exculpatory material from federal authorities. *Commonwealth v. Donahue*, 396 Mass. 590, 598 (1986). This is because of the risk that a defendant prosecuted by state authorities could be prejudiced by coordinated efforts of separate sovereigns to keep exculpatory material in possession of federal authorities. *Ibid.*, 396 Mass. at 597-601 (Discussing factors in determining whether to impute information held by federal authorities to the prosecutor as including potential unfairness to the defendant, the defendant's lack of access to the evidence, the burden on the prosecutor of obtaining the evidence, and the degree of cooperation between state and federal authorities). See also *Commonwealth v. Manning*, 373 Mass. 438, 442 n.5 (1977) (Federal agent who "was the arresting officer, sole prosecution witness, and . . . the prime mover behind the direct indictment . . . must be considered part of the prosecution team.").

Even without joint investigative efforts by state and federal authorities, the potential unfairness from introducing two sovereignties which can deny a defendant access to exculpatory material that would have been available in state court may impose an obligation on the prosecutor to obtain information for the defendant from federal authorities. *Commonwealth v. Bonnett*, 472 Mass. 827, 844-846 (2015) (prosecutor obligated to seek a confidential informant's identity from federal authorities, where the prosecutor knew of an FBI report of a meeting with local police and FBI at which the informant recounted "word on the street" that someone other than the defendant committed the murder); *Commonwealth v. Liebman*, 379 Mass. 671, 674 (1980) (even without joint state and federal prosecution, cooperation between state and federal prosecutors "is and should be common enough" to place the burden on the prosecutor to obtain federal grand jury minutes for the defendant); cf. *Ayala*, 481 Mass. at 56-61 (Because the witness's status as a confidential informant was in the possession and control of federal authorities rather than the Commonwealth; applying the four-factor test set forth in *Donahue*, *supra*, the court did not impose the burden on the Commonwealth to seek the information from federal authorities).

## **Section 14(a)(2)**

*[This is a new section.]*

This section sets forth the prosecutor's obligation to ensure that materials subject to disclosure are identified, collected, disclosed and, where this is not possible, preserved. The prosecutor has discovery obligations with respect to the entire prosecution team which must be discharged in each case. These obligations require a prosecutor to contact all team members who the prosecutor has reason to believe may have information and material subject to disclosure, to inquire about such information, to collect and disclose it, and to take steps to preserve such materials that cannot promptly be disclosed. These

affirmative duties to take certain steps arise under this rule as well as under the due process guarantees of the Federal and Massachusetts constitutions, and the ethical obligations of prosecutors as lawyers. *CPCS v. AG*, 480 Mass. at 731; *Grand Jury Investigation*, 485 Mass. at 647-648.

These duties to seek and assess the discoverability of items and information exist absent any specific discovery order by the court. For example, in *Commonwealth v. Daniels*, 445 Mass. 392 (2005), the Supreme Judicial Court held that the prosecutor in a felony murder case involving a robbery was obligated to disclose a witness's statement in a separate case that indirectly undermined the identification of the defendant in the felony murder. This obligation applied even though the trial court had denied the defendant's discovery request for information about the separate murder; the Commonwealth nonetheless had a duty to independently review the material in the separate case to determine whether it had to be disclosed. "While due process does not require prosecutorial clairvoyance[,] it does, however, require continued vigilance . . . for information the Commonwealth knows, or should know, the defendant seeks as material to his defense." 445 Mass. at 403-404.

#### **14(a)(2)(A)**

*[This is a new section.]*

This section sets forth how the prosecutor is to ascertain the items and information subject to automatic discovery. It should be read in conjunction with the definition of the prosecution team in section 14(a)(1). This section incorporates into the rule the duty in existing case law to seek material subject to disclosure from the team members. *Ware*, 471 Mass. at 95 ("It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team.'") (citing *Beal*, 429 Mass. at 532). The duty to inform and inquire applies equally to all materials subject to automatic discovery, whether investigative materials or items and information favorable to the defense. Mass. R. Crim. P. 14(b)(1) and (2).

Each prosecutor handling the case has a constitutional obligation, and a duty under this rule, to determine whether each member of the prosecution team has material subject to disclosure. *Whitley*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Martin*, 427 Mass. at 823 ("The prosecution had a duty to inquire concerning the existence of scientific tests, at least those conducted by the Commonwealth's own crime laboratory. That obligation is inherent in the allowance of the motion to produce all scientific tests. It could not satisfy the production order simply by turning over test information that it had in its files. It had a duty of inquiry."). See also *Cruz*, 481 Mass. at 1022 (Vacating discovery order that required the prosecutor to review Boston

Police department internal affairs division records concerning search warrant affiant “did nothing to relieve the Commonwealth of its ongoing duty to disclose exculpatory information—including any material, exculpatory information related to past discipline or internal investigation of the officer in question—to the extent such information is in the possession, custody, or control of the prosecution team.”).

#### Informing members of the prosecution team of the disclosure obligation

The obligation in this section is twofold: to inform members of the prosecution team about the prosecutor’s disclosure obligations and to ask whether each member has materials subject to disclosure. The scope of this obligation is necessarily case-specific. It extends to every member of the prosecution team “whom the prosecutor has reason to believe may be in possession” of discoverable material. Mass. R. Crim. P. 14(a)(2)(A). A prosecutor may have reason to believe that a member of the prosecution team may possess discoverable material based on the nature of the team member’s role, the prosecutor’s experience with the team member, or on information from the team member concerning the case at hand.

The obligation then requires that the prosecutor affirmatively contact “each such person.” Although persons may recur as members of the prosecution team in many cases (such as personnel of entities listed in sections 14(A)(1)(A)-(E)), this duty cannot be discharged by a form or blanket communication to the entire organization or office, and it must be affirmatively discharged anew in each case. Individuals, not entities, are members of the prosecution team. Limiting the inquiry obligation to team members whom the prosecutor “has reason to believe may be in possession” of items or information subject to disclosure is designed to prevent such blanket communications and instead focus the prosecutor’s inquiry on the individuals most likely to possess such material in each specific case.

The prosecutor’s obligation to inform members of the prosecution team of the duty to disclose all information favorable to the defense is a nationally recognized standard. American Bar Association, Standard 3-5.4, Criminal Justice Standards for the Prosecution Function (4th Ed., Nov. 12, 2018) (Identification and Disclosure of Information and Evidence) (“(b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.”).

The duty to inform prosecution team members of disclosure obligations and to ask whether there are such materials rests on the prosecutor for two reasons. First, ascertaining materials subject to disclosure is fundamentally a legal determination that requires knowledge of facts in a legal context, and many team members will not be lawyers. Second, whether items or information held by one member of the prosecution team may be subject to disclosure may depend on knowledge about other aspects of the

investigation or prosecution. As the Supreme Judicial Court explained in *Bing Sial Liang*, 434 Mass. 131, in which it held that victim-witness advocates are members of the prosecution team:

*Prosecutors have the primary burden of determining whether the [victim-witness] advocates possess exculpatory information. Although advocates may have acquired extensive knowledge of the legal system, they generally are not attorneys and may be unable to determine whether their notes contain exculpatory evidence. Further, they may be unaware whether a victim or witness has communicated a different version of events to the police, grand jury, prosecutor, or others. Prosecutors therefore are responsible for asking advocates about their conversations with victims or witnesses, reviewing the advocates' notes, and disclosing any exculpatory evidence therein.*

*Bing Sial Liang*, 434 Mass. at 136.

Inquiring of prosecution team members as to the existence of items or information subject to disclosure

Prosecutors must discharge the duty to inquire of team members bearing in mind the definition of the prosecution team. The prosecution team consists of those persons whose possession, custody, or control of items or information is imputed to the prosecutor. “A prosecutor’s duty to disclose necessarily encompasses information that may not even be known to the prosecutor or housed within his or her files, so long as the information is related directly to the crimes at issue and is in the possession of some prosecution team member.” *Graham*, 493 Mass. at 362.

The prosecutor’s failure to learn of materials subject to disclosure is as harmful to due process as the prosecutor’s failure to disclose such materials that the prosecutor possesses. *Commonwealth v. Merry*, 453 Mass. 653, 664 (2009) (Essex County prosecutor’s unintentional failure to disclose an accident reconstructionist’s opinion concerning the cause of a broken windshield in a vehicular homicide case to the Suffolk County trial prosecutor violated disclosure obligations); *Commonwealth v. Tucceri*, 412 Mass. 401, 406-408 (1992). When the prosecutor is aware that multiple law enforcement agencies are exchanging information concerning a key witness and may be providing the witness with promises or benefits, there is a duty of inquiry. *Smith*, 90 Mass. App. Ct. at 268 (While “a prosecutor has no duty to investigate every possible source of exculpatory information on behalf of the defendant and . . . his obligation to disclose exculpatory information is limited to that in the possession of the prosecutor or police, *Commonwealth v. Campbell*, 378 Mass. 680, 702 (1979), it is clear from the record that the Norfolk district attorney, the Suffolk district attorney, and the State police were communicating with each other



regarding [the principal prosecution witness] and his involvement in their various investigations. Any information on other benefits conferred upon [this witness] by these or other entities should have been disclosed.”).

Beyond individual prosecutors questioning members of the prosecution team whom the prosecutor has reason to believe may have items or information subject to disclosure, the Supreme Judicial Court has strongly recommended prosecuting offices create policies by which to supplement such material from the agencies with which team members work. Matter of a Grand Jury Investigation, 485 Mass. at 658-660 n.16. Some of the most critical information subject to disclosure, such as potential impeachment material concerning prosecution witnesses, cannot be expected to reliably be disclosed by those same witnesses. But finding this information known to team members and disclosing it to the defense is a prosecutor’s core duty. “For a prosecutor, disclosure of information that may permit a defendant to prove his or her innocence should be equally as important as securing the conviction of a guilty party.” Id. at 657. Because of the difficulty of obtaining this information directly from the witness, and ensuring it is complete, the Supreme Judicial Court strongly recommends that prosecuting offices develop policies by which a designated “requesting official” can seek this information from an official of the team member’s agency.

The Supreme Judicial Court has specifically endorsed the approach in the Justice Department’s “Giglio Policy.” First, this policy requires that the prosecutor have a “candid conversation” with each law enforcement witness concerning any potential impeachment material, regardless of whether it is known to the public.

*We note that the United States Department of Justice, through its “Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses,” known as its “Giglio Policy,” has established a procedure whereby Federal prosecutors obtain potential impeachment information from Federal investigative agencies, such as the Federal Bureau of Investigation, regarding law enforcement agents and employees who may be witnesses in the cases they prosecute. United States Department of Justice, Justice Manual, Tit. 9-5.100 (updated Jan. 2020) (Manual). According to the policy:*

*“Prosecutors should have a candid conversation with each potential investigative agency witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it*

*producing the material or taking steps to preclude its improper introduction into evidence.” Id. at Tit. 9-5.100(1).*

Id., 485 Mass. at 658-659.

Second, under the Federal policy each prosecuting office has a designated point person (a “requesting official”) who can inquire of specific liaisons (“designated officials”) in each investigative agency about the existence of any material subject to disclosure. Use of a designated official avoids the obvious problem of relying on self-disclosure by a team member.

*In addition, each United States Attorney’s office designates a “requesting official” who may ask an investigative agency’s official to provide potential impeachment information regarding an agency employee associated with the case or matter being prosecuted. Id. at Tit. 9-5.100(2)-(4). When a case is initiated within the United States Attorney’s office, the prosecutor responsible for the case, to supplement the information obtained directly from the agency employees involved in the case, may ask the office’s requesting official to obtain from the agency’s designated official any potential impeachment information regarding those agency employees. Id. at Tit. 9-5.00(4).*

The Federal policy also details the broad scope of information subject to disclosure to the prosecutor as potential impeachment information, some of which would be very difficult for the prosecutor to learn of otherwise.

Potential impeachment information may include, but is not limited to:

- (i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;
- (ii) any past or pending criminal charge brought against the employee;
- (iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
- (iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
- (v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence . . . ;

- (vi) information that may be used to suggest that the agency employee is biased for or against a defendant . . .; and
- (vii) information that reflects that the agency employee's ability to perceive and recall truth is impaired.

Id. at Tit. 9-5.100(c)(5).

As the Court explained, this policy “reflects the [Justice] department’s recognition of the need for prosecutors to learn of potential impeachment information regarding all the investigating agents and employees participating in the cases they prosecute, so that they may consider whether the information should be disclosed to defense counsel under the Brady and Giglio line of cases.” Acknowledging “[w]e do not possess the authority to require the Attorney General and every district attorney in this Commonwealth to promulgate a comparable policy,” the Court nevertheless stated plainly that “we strongly recommend that they do.” *Matter of a Grand Jury Investigation*, 485 Mass. at 658-660. See also *Graham*, 493 Mass. at 363 (“To comply with its obligations under Giglio, to disclose information known to the prosecution team, it behooves the prosecutor’s office to institute formal disclosure procedures to ensure the communication of all material information to defense counsel.”).

The Supreme Judicial Court further cited the practices of three district attorney’s offices in the Commonwealth, as well as those of chief law enforcement officers of three states, that have created lists of officers accused of or found to have engaged in misconduct, or protocols to facilitate disclosure of such impeachment material. *Matter of a Grand Jury Investigation*, 485 Mass. at 661 n.16. The district attorney’s offices referenced maintained lists of law enforcement officers whose misconduct might need to be disclosed as relevant to the officers’ credibility. Id. The Attorney Generals of New Hampshire and New Jersey, and the Association of Prosecuting Attorneys of Washington state have established protocols by which prosecutors can obtain any potentially exculpatory material from law enforcement and investigative agencies. Id. The Supreme Judicial Court has previously suggested that “centralized consideration” by administrative justices or chief administrative justices may be necessary to avoid police misconduct in seeking search warrants and to ensure the adequacy of police procedures for preventing such misconduct. *Commonwealth v. Lewin*, 405 Mass. 566, 586 n.12 (1989). If an office does maintain such a database or list, the prosecutor must disclose its information about any prosecution witness as this is information favorable to the defense. Mass. R. Crim. P. 14(b)(2)(C)(i)(h).

All disclosure obligations impose a duty to make “reasonable inquiry” under Rule 14.2(e). Review of material that is subject to disclosure will frequently reference other material that

is also subject to disclosure, and counsel cannot comply with disclosure obligations without discharging this duty to make reasonable inquiry concerning the existence of other items or information. Frith, 458 Mass. at 440 (Prosecutor failed to discharge disclosure obligation when “even a cursory reading of [one] Incident Report” would have alerted the prosecutor to the existence of a related report subject to disclosure.). “[I]t is incumbent on an Assistant District Attorney to ask a police prosecutor, or other similar official, whether **all** discoverable materials relating to a particular case have been given to the Commonwealth.” Id. (citations omitted) (emphasis in original). “Reasonableness demands, at the very least, that prosecutors ask other members of the prosecution team whether exculpatory information exists, particularly any information specifically requested by defense counsel or required to be disclosed under rule 14.” Graham, 493 Mass. at 369. See also Commonwealth v. Diaz, 100 Mass. App. Ct. 588, 593 (2022) (When police seized defendant’s cell phone and defense counsel had requested ‘all cell phone data,’ “[t]he scope of reasonable inquiry for the prosecutor, informed by the defense request for the call log data, extended to inquiring of the detectives whether that information was accessible to the government.”); Commonwealth v. Elangwe, 85 Mass. App. Ct. 189, 201 n.18 (2014) (When victim responded that she had no knowledge of whether a civil suit against criminal defendant was pending, “the prosecutor would have been prudent to press [the victim] for an unequivocal answer once the subject was broached.”). However, the duty of inquiry does not extend to unadjudicated civil allegations against members of the prosecution team. Commonwealth v. McFarlane, 493 Mass. 385 (2024) (Holding prosecutor had no duty of inquiry concerning pending federal suit against police officer, in unrelated case that predated defendant’s, alleging malicious prosecution, false arrest, false imprisonment and excessive force.).

#### **14(a)(2)(B)**

*[This is a new section.]*

This section sets forth the prosecutor’s essential duty with respect to materials subject to automatic discovery: collect and disclose them to the defense. This duty extends to all items and information in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team. Beal, 429 Mass. at 531-532. Whether items or information are in the “possession, custody, or control” of the prosecutor is determined according to “practical indicia.” Torres, 479 Mass. at 648 (victim’s compensation claim records in the Attorney General’s office were not in the “possession, custody or control” of the district attorney where the Attorney General did not participate in the investigation and the prosecutor lacked access to the Attorney General’s files). See also Cruz, 481 Mass. 1021; Wanis, 426 Mass. at 643-44 (police department’s internal affairs files are not under prosecutor’s custody or control, but statements of percipient

witnesses may be subject to disclosure under Mass. R. Crim. P. 17). “Once a third-party record is obtained by the Commonwealth, however, it becomes part of the prosecutor’s case file, triggering discovery obligations.” *Commonwealth v. Kostka*, 489 Mass. 399, 412 (2022).

The disclosure obligation applies to all items and information subject to automatic disclosure, even if the items or information are already known to the defendant or are publicly available. *Commonwealth v. Correia*, 492 Mass. 220, 223-225 (2023) (Prosecutor possessed and was obligated to disclose song lyrics defendant composed despite their being publicly available on a third party website because the prosecutor maintained them in its file as shown by quoting from them in cross examination and showing an image displayed alongside them); *Commonwealth v. Eneh*, 76 Mass. App. Ct. 672, 677-680 (2010) (Commonwealth’s delayed disclosure of defendant’s inculpatory bank records required a new trial, despite the defendant’s knowledge of their existence, because they undermined his lawyer’s presentation of his entrapment defense).

#### **14(a)(2)(C)**

*[This is a new section.]*

This section sets forth what the prosecutor must do upon learning of items or information subject to mandatory discovery that cannot promptly be collected and disclosed. In these circumstances, the prosecutor must notify the defendant of the existence of these items or information (and, if known, of their location) and direct an appropriate member of the prosecution team to preserve them until they can be disclosed. *Commonwealth v. Charles*, 397 Mass. 1, 13-14 (1986) (“We have repeatedly stressed the need for prosecutors and police to do their utmost to preserve and present ‘exculpatory evidence which is available to the prosecution.’”). See also *Commonwealth v. Sasville*, 35 Mass. App. Ct. 15, 18-20 (1993) (Commonwealth’s duty extends to preserving potentially exculpatory evidence).

Separately, under Rule 14.2(c)(1), if the prosecutor learns of items or information held by third parties that would be subject to disclosure if they were in the possession, custody, or control of the prosecutor, the prosecuting office, or the prosecution team, the prosecutor must notify the defendant of their existence and the identity of any persons possessing them. This enables the defendant to seek a preservation order directed to the individual, agency, or entity with possession, custody, or control over them. Rule 14.2(c)(2).

The prosecutor typically has more extensive and earlier knowledge about items and information subject to mandatory discovery than does the defendant and delay in providing these materials can impair the defense. “Modern rules of discovery were created to permit defense counsel to learn, through discovery of the government’s evidence, what the

defendant faces in standing trial, and to assist in preventing trial by ambush.” Eneh, 76 Mass. App. Ct. at 677. Because of this asymmetry, this section reinforces the importance of timeliness in alerting the defendant to the existence of material whose provision will be delayed. When items or information subject to disclosure cannot be “promptly” copied or made available, the prosecutor must “promptly” notify the defendant of this situation.

Delayed disclosure of items subject to mandatory discovery may impair a defendant’s ability to prepare and present a case. *Commonwealth v. Baldwin*, 385 Mass. 165, 175 (1982) (The issue is “whether the prosecution’s disclosure was sufficiently timely to allow the defendant to make effective use of the evidence in preparing and presenting his case.”). Delayed disclosure can produce an unfair trial. *Commonwealth v. Lam Hue To*, 391 Mass. 301 (1984) (Delayed pretrial disclosure of evidence adversely affected the defendant’s preparation and presentation of his defense, warranting a mistrial and could, in an appropriate case, warrant dismissal of the indictment.). Notification enables the defendant to take any additional steps to ensure disclosure which the defendant deems necessary. See Rule 14.2(c)(2).

#### **14(a)(2)(D)**

*[This is a new section.]*

When the prosecutor learns that items subject to disclosure have been destroyed, lost, altered, or are otherwise unavailable, prompt notification to the defense is essential. The loss or destruction of materials subject to disclosure can pose particular challenges to the defense and to the court. *Commonwealth v. Williams*, 455 Mass. 706, 714-715 (2010). Loss or destruction of exculpatory or even potentially exculpatory evidence can produce complex remedial issues. See *Commonwealth v. Neal*, 392 Mass. 1, 10-12 (1984); *Commonwealth v. Heath*, 89 Mass. App. Ct. 328, 337-340 (Commonwealth’s failure to preserve booking video of alleged assault on officer required new trial); *Commonwealth v. O’Neal*, 93 Mass. App. Ct. 189 (2018) (same). Prompt notification enables the defense to attempt to make a showing, should it choose, of harm from this loss and to seek an appropriate remedy. *Williams*, 455 Mass. at 718-720. The prosecutor’s notification to the defense that items subject to disclosure have been destroyed or are otherwise unavailable must be unambiguous. *O’Neal*, 93 Mass. App. Ct. at 199 (In case of assault on an officer, a prosecutor’s terse statement that surveillance video of booking area was “not available” rather than clarifying, as the prosecutor knew, that it was no longer available because the system automatically recorded over the tapes was a failure to disclose material exculpatory evidence.) When a member of the prosecution team will not provide items or information subject to disclosure, notification of the defense will similarly enable the defendant to seek the assistance of the court.

#### 14(a)(2)(E)

*[This is a new section.]*

Courts have inherent authority to ensure parties comply with their discovery obligations. This section sets forth one means by which the judge may do so, namely by asking the prosecutor what has been done to comply. An identical provision applies equally to the defendant. See Mass. R. Crim. P. 14.1(a).

The court also has specific authority to provide for additional discovery, grant continuances, or make any other order it deems just under the circumstances as relief for noncompliance with discovery obligations. Sanctions for noncompliance may also include the exclusion of evidence, adverse jury instructions, dismissal of charges with or without prejudice, contempt proceedings, or other sanctions. See Mass. R. Crim. P. 14.2(j)(1) and (2); *Commonwealth v. Carney*, 458 Mass. 418, 428 (2010) (although sanctions authority “permits broad range of orders” in response to a failure to comply with discovery orders, a judge is “nonetheless limited to orders that are remedial in nature, aimed at curing any prejudice caused by violation of discovery obligation and ensuring a fair trial”).

Given the prospect of judicial inquiry concerning actions taken to achieve compliance with the rule, the prosecutor should adopt a method for recording actions that are done to discharge discovery obligations. This is especially important as multiple prosecutors may be involved in a case, a case may extend over a lengthy period, or it may be subject to post-conviction challenge. Prosecutors are encouraged to send discovery packets accompanied by a cover letter, signed by the prosecutor, that outlines the discovery being provided. If the discovery is Bates stamped or otherwise numbered, the letter should reference the Bates numbers of the pages of discovery provided.

One prosecutorial manual advises:

*One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case.*

U.S. Department of Justice, Justice Manual, § 9-5.002 (Criminal Discovery).

Disclosure of unwritten or intangible information, such as witness statements that arise shortly before a hearing or in an informal conversation with the prosecutor or a member of

the prosecution team, require particular care and prompt attention. Methods of recording actions could include written or electronic versions of communications, requests, or disclosures, as well as memorialization of verbal communications. See Mass. R. Crim. P. 14(b)(2)(A) and 14(b)(3)(C) (specifying that disclosure of unwritten or intangible information, or oral statements, may be memorialized as soon as there is a reasonable opportunity, manner, and means to do so). Methods of memorialization could include a statement on the record at sidebar, or a note or electronic message. Counsel should take care that both the fact of the disclosure and its substance are memorialized. *Commonwealth v. Williams*, 58 Mass. App. Ct. 139, 146 (2003) (Confusion concerning scope of prosecutor’s oral disclosures to newly appointed counsel concerning identification procedure “illustrates how important it is . . . for the prosecution to avoid reliance on causal disclosures in discharging its discovery obligations.”).

## Section 14(b). Materials subject to automatic discovery

[This is a new section.]

Rule 14(b) defines two categories of materials subject to automatic discovery: investigative materials (Rule 14(b)(1)) and items and information favorable to the defense (Rule 14(b)(2)). “Investigative materials” are those items that were subject to mandatory discovery in prior Rule 14(a)(1)(A), with the exception of “facts of an exculpatory nature” and “promises, rewards or inducements made to witnesses the party intends to present at trial.” These two types of materials are now included in the second major category of materials subject to automatic discovery: “Items and information favorable to the defense.”

This structure modernizes the descriptions of materials that are subject to automatic discovery and updates them to reflect current practice and technology. The structure provides an entirely new section that replaces the six words “[a]ny facts of an exculpatory nature,” with a definition of materials that are favorable to the defense, a description of the scope of items and information to which this definition applies, and a non-exclusive list of examples. Both categories of items and information are equally subject to automatic discovery.

### **14(b)(1) Investigative Materials**

[This is a new section.]

This section sets forth the disclosure the prosecutor must provide the defendant for all materials subject to automatic discovery. This section retains all items that were in prior sections 14(a)(1)(A)(i)-(ix) as “Mandatory Discovery for the Defendant,” with the exception of sections 14(a)(1)(A)(iii) (“facts of an exculpatory nature”) and 14(a)(1)(A)(xi) (“promises, rewards or inducements made to witnesses”). These two categories of material subject to



disclosure are included in the new section 14(b)(2) (“Items and Information to the Defense”).

Section 14(b)(1) uses the new term “Investigative Materials” to distinguish the items and information that are subject to disclosure without regard to their substance, from items and information subject to disclosure because of their exculpatory nature (“Items and Information Favorable to the Defense.”). Both investigative materials and items and information favorable to the defense are equally subject to automatic discovery and to all provisions governing it.

Rule 14(b)(1) retains in sections 14(b)(1)(A)-(I) all items and information for which disclosure by the Commonwealth was previously required and adds to the contact information concerning the Commonwealth’s intended prospective non-law enforcement witnesses their “known contact information.” See Rule 14(b)(1)(C). The rule separates into three sections what was previously one section that required disclosure of police and investigator’s reports, photographs, tangible objects, intended exhibits, reports of physical examinations of any person, scientific tests or experiments that pertain to the case, and statements of intended witnesses. This is done for clarity. See Rules 14(b)(1)(D), (G) and (H).

#### **14(b)(1)(A)**

*[This section makes no change to prior section 14(a)(1)(A)(i).]*

For the definitions of “written statement” and “oral statement,” see Mass. R. Crim. P. 14(b)(3)(A) and (B). Note that information subject to disclosure that is contained in statements in multiple forms may require multiple methods of disclosure. See Mass. R. Crim. P. 14(b)(3)(C).

#### **14(b)(1)(B)**

*[This section makes no change to prior section 14(a)(1)(A)(ii).]*

#### **14(b)(1)(C)**

*[This section makes two changes to prior section 14(a)(1)(A)(iv).]*

This section adds “known contact information” to the identifying information for the Commonwealth’s prospective civilian witnesses that must be disclosed. Since the Rule’s last comprehensive revision in 2004, common methods of communication have changed dramatically and now often include mobile telephone numbers or email addresses. Whatever contact information is known to the prosecutor (or any member of the prosecution team) must be disclosed.

Defense counsel has a constitutional obligation to investigate the Commonwealth's case, for which they must be able to identify and reach prospective prosecution witnesses.

*Commonwealth v. Garcia*, 66 Mass. App. Ct. 167 (2006) (Defense counsel's concession that it was not his practice to interview government witnesses established first prong of Saferian standard of ineffective assistance). While witnesses in a criminal proceeding do not belong to either side and may decline to speak with either side, any effort by the Commonwealth to constrain this choice is improper and may violate art. 12.

*Commonwealth v. St. Pierre*, 377 Mass. 650, 657-658 (1979), citing *Commonwealth v. Balliro*, 349 Mass. 505, 516 (1965). As with any other forms of contact, a litigant concerned about misuse of discoverable information by a party may seek appropriate protective orders. See Mass. R. Crim. P. 14.2(g).

This section omits the previous requirement that the Commonwealth provide demographic information on civilian witnesses to the Probation Service because the method of obtaining records of witnesses' court activity has been changed. See Mass. R. Crim. P. 14.2(b).

#### **14(b)(1)(D)**

*[This is a new section.]*

This section provides for disclosure of statements of persons the prosecutor may call as witnesses, which was provided for under prior section 14(a)(1)(A)(vii). The definition of statements is in section 14(b)(3). This section adds a requirement for disclosure of notes of interviews by law enforcement with persons the prosecutor may call as witnesses, unless these notes are contained within a disclosed witness statement or a report.

The obligation extends to statements of persons who may be called as witnesses that are in the notes of any member of the prosecution team. Law enforcement notes of interviews need not be made contemporaneously to be subject to disclosure. This continues a trend under Massachusetts law of increasing disclosure of witness statements, beyond those that were formally adopted by the witness. See Reporter's Notes to Mass. R. Crim. P. 14(d) (2004) ("Prior informal statements, not intended for court, are not only often admissible at trial but often more probative than formal signed statements in anticipation of litigation. On this view, if police have taken a statement of a witness who will testify, it should be discoverable to the defense."). Statements of persons the prosecutor may call as witnesses that were not taken by law enforcement but have been provided to members of the prosecution team are subject to disclosure as well. *Commonwealth v. Walters*, 472 Mass. 680, 704-705 (2015) (Excerpts from victim witness's journal chronicling alleged incidents with defendant that the witness had emailed to an investigator were subject to disclosure, though delayed disclosure not prejudicial.).

**14(b)(1)(E)**

*[This section makes two changes to prior section 14(a)(1)(A)(v).]*

This section adds to the identifying contact information for the Commonwealth's prospective law enforcement witnesses the witnesses' business telephone numbers and business email addresses. The ubiquity of telephonic and electronic communication, and their use in many important and legally significant contexts, makes this change appropriate. Apart from this addition, this section makes no change to prior section 14(a)(1)(A)(v).

Police or investigative reports subject to discovery may identify law enforcement witnesses only by last name, in which case it is appropriate for prosecutors to ensure that disclosure provides individual contact information that adequately identifies the witness, such as a police officer's badge number. Similarly, as officers may be reassigned over the course of a case and contact information must be current, the prosecutor's continuing duty may require updating location and contact information as appropriate. See Mass. R. Crim. P. 14(d).

**14(b)(1)(F)**

*[This section makes no substantive change to prior section 14(a)(1)(A)(vi).]*

**14(b)(1)(G)**

*[This is a new section.]*

This section identifies items and information subject to disclosure that were previously in prior section 14(a)(1)(A)(viii). It also now includes video and audio recordings, in addition to police or investigator's reports, photographs, tangible objects, and intended exhibits. This section omits the requirement that the items or information be "material and relevant," which originated in G.L. c. 218, § 26A par. 2, as all investigative materials subject to automatic discovery must be "relevant to the case" pursuant to Rule 14(b)(1). If these items are relevant to the case, the prosecutor must disclose any of them (photographs, video recordings, audio recordings, police or investigator's reports, or other tangible objects) without regard to whether the prosecutor intends to introduce them at trial. This may include, for example, "turret tapes" of police radio transmissions, body-camera recordings, booking videos, or surveillance videos.

Disclosure of the remaining items from the prior section, including statements of persons the prosecution intends to call as witnesses and reports of physical examinations, scientific tests, or experiments, are provided for in sections 14(b)(1)(D) and 14(b)(1)(H).

**14(b)(1)(H)**

*[This is a new section.]*

This section identifies items and information subject to disclosure that were previously in prior section 14(a)(1)(A)(vii). As before, this includes reports of physical examinations of any person or of scientific tests or experiments. This section omits the requirement that the items or information be “material and relevant,” which originated in G.L. c. 218, § 26A par. 2, as all investigative materials subject to automatic discovery must be “relevant to the case” pursuant to Rule 14(b)(1).

As under the prior rule, reports of physical examinations of any person or of scientific tests or experiments that pertain to the case must be disclosed regardless of whether they are intended to be introduced at trial and whether they were prepared by an expert. See Reporter’s Notes to [prior] Rule 14(a)(1)(vii) (Revised, 2004).

#### **14(b)(1)(I)**

*[This section makes no change to prior section 14(a)(1)(A)(viii).]*

#### **14(b)(2) Items and Information Favorable to the Defense**

*[This section replaces prior sections 14(a)(1)(A)(iii) and 14(a)(1)(A)(ix).]*

This section implements the Supreme Judicial Court’s directive in *CPCS v. AG* to develop a “more thorough baseline of the most likely sources and types of exculpatory information for prosecutors to consider.” 480 Mass. at 732. While the Court sought a “Brady checklist,” it also recognized that “[n]o checklist can exhaust all potential sources of exculpatory evidence.” *Id.* at 733. This section sets forth the scope of the “broad duty” to disclose exculpatory material under the Massachusetts Rules of Criminal Procedure (Rule 14(b)(2)(A)), provides a general definition of material subject to disclosure because it is exculpatory (Rule 14(b)(2)(B)), and gives a non-exclusive list of examples of such material (Rule 14(b)(2)(C)). *Matter of a Grand Jury Investigation*, 485 Mass. at 647 (discussing prosecutor’s “broad duty” of disclosure under [the Massachusetts Rules of Criminal Procedure] as “more than a constitutional duty”). Items and information favorable to the defense, like investigative materials addressed in Rule 14(b)(1), are subject to automatic discovery.

Rule 14(b)(2)(A) sets forth the scope of the duty to disclose items and information favorable to the defense. This duty requires that the prosecutor approach identifying these materials from a neutral perspective rather than from the perspective of an advocate for the Commonwealth.

Rule 14(b)(2)(B) sets forth a general definition of material “favorable to the defense” as items or information that “tend to” serve one or more of eight functions in a case. Applying this definition requires that the prosecutor consider how material could function for the defendant at any stage of the case, from suppression or exclusion of evidence, through the

prosecution's case-in-chief, the defendant's case, rebuttal, and sentencing. Material that is favorable to the defense by tending to serve any of these eight functions at any stage of the case must be disclosed.

Rule 14(b)(2)(C) provides five categories of material as examples of items or information that are favorable to the defense, either because they are potential impeachment material or because they may support one or more theories of defense. They include information that can potentially impeach any witness the prosecutor may call (Rule 14(b)(2)(C)(i)), information that can potentially impeach any percipient witness, without regard to whether the prosecutor may call the witness (Rule 14(b)(2)(C)(ii)), information that can potentially impeach any expert witness (except one related to criminal responsibility) the prosecutor may call (Rule 14(b)(2)(C)(iii)), or statements of any person the prosecutor does not anticipate calling that are inconsistent with the statements of any witness the prosecutor may call (Rule 14(b)(2)(C)(iv)). Finally, material may be favorable to the defense because it supports one or more theories of defense (Rule 14(b)(2)(C)(v)).

Items or information that fall within one of these five categories of Rule 14(b)(2)(C) constitute material that is favorable to the defense and so must be disclosed as part of automatic discovery. These five categories are only examples, however, and they are non-exclusive. Given the relevant facts, and the theories of the prosecutor or of the defendant in any specific case, there may be other ways that material performs one of the eight functions set forth in the general definition of Rule 14(b)(2)(B). Material that performs any of the functions listed in the general definition is favorable to the defense and must be disclosed as part of automatic discovery, without regard to whether it fits any of the example categories in Rule 14(b)(2)(C).

The timing of disclosure for material favorable to the defense is the same as that for all other automatic discovery and it is subject to the same requirement for certification of compliance. Mass. R. Crim. P. 14(c) and 14.2(e). Although material that is favorable to the defense is also subject to disclosure under Federal and state constitutional requirements of due process, the timing of disclosure required under the Massachusetts Rules of Criminal Procedure is not the same as that required to avoid a due process violation. While a due process violation may be avoided if exculpatory material is disclosed in time for its use at trial, the Massachusetts Rules of Criminal Procedure require disclosure well before that. *Matter of a Grand Jury Investigation*, 485 Mass. at 649-650. The obligation to disclose material favorable to the defense continues well beyond pretrial discovery through trial itself. *Commonwealth v. Ware*, 482 Mass. 717, 724-727 (2019) (Prosecution's failure to disclose its witness had testified falsely, or its allowing false testimony to go uncorrected, was a fundamental miscarriage of justice).

## **14(b)(2)(A) Scope**

*[This is a new section.]*

The obligation to disclose exculpatory material arises from the “prosecutor’s core duty” to “administer justice fairly.” *CPCS v. AG*, 480 Mass. at 730 (citing *Tucceri*, 412 Mass. at 408). This duty is based on Federal and state guarantees of due process, and the Massachusetts Rules of Criminal Procedure. *Brady*, 373 U.S. at 87 (“suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution”); *Matter of a Grand Jury Investigation*, 485 Mass. at 649 (“[I]n Massachusetts, when we speak of a prosecutor’s Brady obligation, we mean not only the constitutional obligation to disclose exculpatory information but also the broad obligation under our rules to disclose any facts that would tend to exculpate the defendant or tend to diminish his or her culpability.”).

These disclosure duties must be interpreted in light of prosecutors’ general ethical obligations as lawyers and their special ethical obligations as prosecutors. Mass. R. Prof. C. 3.4(a) (“Lawyer shall not unlawfully obstruct another party’s access to evidence or . . . conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”), Mass. R. Prof. C. 3.8(d) (“Prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”), Mass. R. Prof. C. 3.8(g) (“Prosecutor in a criminal case shall: . . . (g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused”) and Mass. R. Prof. C. 3.8(i) (Prosecutor’s obligations upon learning of new, credible and material evidence creating reasonable likelihood convicted defendant did not commit an offense of which the defendant was convicted to disclose evidence to court, prosecuting office and defendant).

To properly assess whether information is subject to disclosure under Rule 14(b)(2), the prosecutor must completely set aside the role of advocate and instead adopt the perspective of a neutral reviewer of information who has no interest in the outcome of the case. “These disclosure requirements are inconsistent with the traditional adversary role of litigants.” *Tucceri*, 412 Mass. at 408. This, however, is the essence of the prosecutor’s job. “[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions.” *Id.*

### Duties of disclosure and inquiry

The prosecutor's duty to disclose material favorable to the defense necessarily carries with it a corresponding duty to investigate accusations of misconduct by any member of the prosecution team. *Graham*, 493 Mass. at 350 & 367 (Where federal investigation found police department's officers routinely falsified investigative reports and engaged in pattern or practice of unconstitutional uses of force, the District Attorney's office's failure to obtain all documents reviewed by federal investigators violated its duty to investigate and inquire about material favorable to the defense.). The duties of inquiry and disclosure are "inextricably connected." *McFarlane*, 493 Mass. at 392. "Because the prosecution must disclose all evidence in the possession, custody, or control of the prosecution team that 'tends to' exculpate defendants, the prosecution also must inquire about the existence of such evidence among members of the prosecution team." *Id.* (citing *Matter of a Grand Jury Investigation*, 485 Mass. at 649).

The prosecutor has a "duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team." *Commonwealth v. Cotto*, 471, Mass. 97, 112 (2015) (internal quotations omitted). See also *Ware*, 471 Mass. at 95 (Where prosecutors had information suggesting a drug analyst had engaged in misconduct at the Amherst drug lab, they "had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect on pending cases and on cases in which defendants already had been convicted."). The duty of inquiry is not unlimited. It does not extend to unadjudicated allegations of civil liability. *McFarlane*, 493 Mass. at 391-392. "Findings of civil liability on the part of members of the prosecution team in the performance of their official duties are subject to automatic disclosure and fall within the duty of inquiry." *Id.*, 493 Mass. at 393.

### Favorable to the defense

Unlike prior section 14(a)(1)(A)(iii), this section uses the term "favorable to the defense" instead of "exculpatory" in order to make clear that items and information subject to disclosure need not offer "complete proof of innocence, but simply imports evidence which tends to negate the guilt of the accused . . . or, stated affirmatively, support[s] the innocence of the defendant." *CPCS v. AG*, 480 Mass. at 732, citing *Ellison*, 376 Mass. at 22 n.9 (quotations omitted). "Evidence may be favorable or exculpatory, and thus required to be disclosed, although it is not absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence." (quotations and citation omitted). *Commonwealth v. Laguer*, 448 Mass. 585, 595 (2007). Exculpatory "is not a narrow term that connotes an alibi or other complete proof of innocence." *Elspeth B. Cypher*, *Criminal Practice and Procedure*, Massachusetts Practice Series, §26.16. Rather, "exculpatory" in this context comprehends all evidence that "provides some significant aid to the

defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Ellison, 367 Mass. at 22.

Material that is favorable to the defense includes items or information that would aid the defense but would not alone create a reasonable doubt. "This duty is not limited to information so important that its disclosure would create a reasonable doubt that otherwise would not exist; it includes all information that would 'tend to' indicate that the defendant might not be guilty or 'tend to' show that a lesser conviction or sentence would be appropriate." Matter of a Grand Jury Investigation, 485 Mass. at 649. "So long as there is a reasonable argument that the evidence may be useful to the defense, . . . it is exculpatory." Diaz, 100 Mass. App. Ct. at 594.

Doubts as to whether materials are favorable to the defense should be resolved through disclosure. Id., 485 Mass. at 650 (2020) ("[W]here a prosecutor is uncertain whether information is exculpatory, the prosecutor should err on the side of caution and disclose it."). See also Commonwealth v. Wilson, 381 Mass. 90, 107 n.37 (1980) ("The present case, therefore, illustrates with some force the wise suggestion that 'prosecuting attorneys . . . become accustomed to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it.'" Commentary to A.B.A. Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, 2.1(d) (Approved Draft 1970)."); Commonwealth v. Murray, 461 Mass. 10, 23 n.10 (2011) (same). Of course, if a prosecutor believes there are valid reasons to limit or restrict disclosure, such as privilege, work product, or the safety of a witness, the prosecutor may seek an appropriate protective order and in camera review. See Rule 14.2(f) and 14.2(g); CPCS v. AG, 480 Mass. at 733 ("We emphasize, in addition, that where a prosecutor is unsure whether exculpatory information should be disclosed, due to a concern regarding privilege or work product, or for any other reason, the prosecutor must file a motion for a protective order and must present the information for a judge to review in camera."). Note, however, that work product under the Rule specifically does not include items or information the prosecutor is obligated to disclose because they are favorable to the defense. See Mass. R. Crim. P. 14.2(f).

Disclosure required without regard to prosecutor's view of material's credibility, reliability, or admissibility

The prosecutor's judgment concerning the quality of the evidence has no bearing on whether it must be disclosed. The obligation to disclose exculpatory material is not discretionary; it is "an obligation, not a decision." Graham, 493 Mass. at 364. Favorable



evidence need not fully exculpate, or even fully resolve an issue. “Favorable evidence need not be dispositive evidence.” *Murray*, 461 Mass. at 19 (citing *Daniels*, 445 Mass. at 401, internal quotations omitted) (New trial ordered for failure to disclose detective’s knowledge about murder victim’s participation in violent gang that could have supported defendant’s self-defense claim by showing basis for his fear and could have impeached Commonwealth’s witnesses’ testimony that gang was just an informal group of neighborhood friends.).

The prosecutor’s judgment concerning the significance of the information to the Commonwealth’s own case also plays no role in determining whether it is favorable to the defense. Information may be favorable to the defense without contradicting the prosecution’s theory if it could support a theory upon which the defendant might rely. In *Smith*, 90 Mass. App. Ct. 261 for example, the defendant was charged with armed home invasion, and a resident (Lowe) was the principal prosecution witness. The prosecution’s theory was that the defendant sought to kill Lowe to prevent him from testifying in an unrelated homicide, while the defendant contended he had simply come to buy drugs when someone else unexpectedly burst in. The prosecution’s failure to disclose that Lowe’s girlfriend, Semnack, who had also been present, was planning to testify as a prosecution witness the next day in yet another homicide case would have violated its disclosure obligation. If the prosecution failed to “disclose Semnack’s witness status, then the defendant was deprived of the ability to present evidence in support of his claim that he was only there to buy drugs.” *Id.* at 267. This information was favorable to the defendant because evidence of a motive to harm someone other than Lowe could have “rounded out the jury’s picture of the case and shed light on other evidence offered by the defendant to show that the gunman acted alone.” *Id.*

Information subject to disclosure as “favorable to the defense” need not be in any particular form and most significantly it need not be reduced to tangible form. This understanding of disclosure obligations pre-dates prior Mass. R. Crim. P. 14. *Commonwealth v. Gilbert*, 377 Mass. 887, 892-893 (1979) (citing *Commonwealth v. Lewinski*, 367 Mass. 889 (1975) and then-future Mass. R. Crim. P. 14, which had not yet taken effect, in holding that prosecutor’s failure to disclose witness’s changed account after prior statement had been provided defense counsel violated disclosure obligation). Prosecutors and law enforcement personnel regularly communicate with many persons in the investigation of a case and its preparation for trial. Any such communication, whether oral, written, telephonic, or electronic, that is favorable to the defense must be disclosed, whether it is a formal statement or a passing remark. *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021) (Prosecutor’s failure in murder case to disclose conversation with a key witness, two days before her testimony, in which she added inculpatory details of

defendant's laughter after stabbing victim that was directly relevant to Commonwealth's theory of extreme atrocity or cruelty was an "indisputable" Brady violation because of its discrepancy with witness's prior statement to police.).

Gilbert, 377 Mass. 887, is instructive. The day before he was to testify, a prosecution witness, whose prior statement to police had been disclosed to the defense, told the trial prosecutor that events were different than he had previously recounted. Even though the witness's recollection was actually more incriminating to the defendant, the court nevertheless found that "failing to communicate promptly to the defense the changes in [the witness's] story" violated the prosecution's disclosure obligation. The violation was equally severe despite the non-disclosure being due to the prosecutor's carelessness or inadvertence. *Id.* at 892-893. Moreover, this violation was not cured by the prosecutor's advice that the witness should testify truthfully. *Id.* at 892.

The obligation to disclose material that is favorable to the defense, like all disclosure obligations, is a continuing one. Mass. R. Crim. P. 14(d). Thus statements a prospective witness makes to a prosecutor or to law enforcement personnel during trial preparation, as in Gilbert, that are inconsistent with the witness's prior statements must be disclosed. Accord *Commonwealth v. Vaughn*, 32 Mass. App. Ct. 435, 439 (1992) (Failure to disclose investigating detective's testimony that he observed three sets of footprints at burglary scene, despite his investigative report, grand jury testimony, and diagram which described or showed only two sets, violated due process as it was "no mere shift in detail only and [went] to the heart of the defendant's case.>").

In evaluating differences between a prosecution witness's prior statements to authorities and the witness's anticipated trial testimony, "[e]ven minor evidentiary discrepancies can take on great meaning to the defense." Baldwin, 385 Mass. at 174-175 (Discrepancies between prosecution witness's anticipated trial testimony and his prior statement disclosed to defense, suggesting alleged murder weapon might not have been stolen by defendant before crime and that defendant quickly left Massachusetts after crime evincing consciousness of guilt, were exculpatory and should have been disclosed prior to the witness's testimony).

Information that may be "favorable to the defense" is necessarily case-specific and may be innocuous unless considered from the perspective of the defendant. In *Commonwealth v. McMillan*, 98 Mass. App. Ct. 409 (2020), for example, the locations of officers who observed a confidential informant were information that was favorable to the defense. Although the prosecutor had disclosed a single location from which officers observed the informant conduct the drug transaction at issue, an officer testified at trial that he had observed the transaction from a different location. The delayed disclosure of observation

locations “rendered useless counsel’s impressively diligent pretrial work” demonstrating obstructed views, and posttrial investigation showed that even the views from these locations were obstructed. The delayed disclosure prevented the defendant from being able to properly cross-examine the officers on their observations as “the defendant would need to know the distance from the observation post to the site of the alleged crime, [and] obstructions or impediments to a clear view.” *Id.*, at 417.

#### Regardless of tangible form

Information that is favorable to the defendant need not have been reduced to writing in order to be subject to disclosure. *Gilbert*, 377 Mass. at 892-894 (Assistant district attorney’s failure to disclose prosecution witness’s oral statement that his previous written statement to police was incomplete violated disclosure obligation, and prosecutor’s directive to witness to “tell the truth” in testimony did not substitute for disclosure); *Commonwealth v. Pizzotti*, 27 Mass. App. Ct. 376, 382 (1989) (Fresh complaint witness’s statement to prosecutor that varied from her grand jury testimony was thereby exculpatory and should have been disclosed despite not being reduced to writing); *Commonwealth v. Santana*, 465 Mass. 270, 292 (2013) (Eyewitness’s statement to state trooper after voir dire on his competence to testify that he did not recognize anyone in the courtroom, when he had previously testified at the grand jury that he had witnessed the homicide, was subject to disclosure.).

#### Memorialization of disclosure of unwritten or intangible information

A witness’s oral statement or gesture intended as an assertion that is favorable to the defense is subject to disclosure. If disclosure is made orally, as may occur when a statement is learned during or shortly before a proceeding, the fact of the disclosure must also be memorialized as soon as there is a reasonable opportunity to do so. Memorialization can be done in writing or in other methods appropriate under the circumstances, such as a statement on the record made at a sidebar conference.

#### **14(b)(2)(B) Definition**

*[This is a new section.]*

This section provides the basic definition of materials subject to disclosure under Brady and its progeny, Article 12 of the Massachusetts Declaration of Rights, and the Massachusetts Rules of Criminal Procedure (Mass. R. Crim. P. 14). The definition must be interpreted by prosecutors in light of their general ethical obligations as lawyers and their special ethical obligations as prosecutors. Mass. R. Prof. C., 3.4(a), 3.8(d), (g), and (i).

Items and information are “favorable to the defense” if they tend to perform one or more of eight functions in a case. These functions including tending to cast doubt on elements of,

evidence of, or testimony supporting the Commonwealth's case, supporting suppression or exclusion of any evidence or witnesses offered by the Commonwealth, mitigating the charged offenses or lesser included offenses, establishing a defense, or corroborating the defense version of facts.

While the ways in which materials can be favorable to the defense are necessarily case-specific, the degree to which they are favorable to the defense is irrelevant under Rule 14. "This duty is not limited to information so important that its disclosure would create a reasonable doubt that otherwise would not exist; it includes all information that would 'tend to' indicate that the defendant might not be guilty or 'tend to' show that a lesser conviction or sentence would be appropriate." *Matter of a Grand Jury Investigation*, 485 Mass. at 649. See also *Commonwealth v. Collins*, 470 Mass. 255, 267 (2014) (citing *Commonwealth v. Hill*, 432 Mass. 704, 715 (2000), "Commonwealth is required to disclose exculpatory evidence to the defendant, including, as is relevant here, evidence that would tend to impeach the credibility of a key prosecution witness."). The prosecutor must not consider how much the information would aid the defense or whether a reviewing court would fault the failure to disclose the information. "A prosecutor should not attempt to determine how much exculpatory information can be withheld without violating a defendant's right to a fair trial. Rather, once the information is determined to be exculpatory, it should be disclosed—period." *Matter of a Grand Jury Investigation*, 485 Mass. at 650.

The modern approach to defining materials subject to disclosure has been to avoid simply citing *Brady* or describing materials as "exculpatory," because these formulae presume an understanding of how materials can advantage a defendant. Instead, more recent definitions identify specific ways in which materials can favor a defendant. Compare Article 240.20(1)(h), McKinney's N.Y. Crim. Proc. L. ("Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States") (Repealed by L.2019, C. 59, Pt. LLL, § 1, eff. Jan. 1, 2020), with its replacement, Article 245.20(1)(k) ("All evidence and information, . . . that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment."). See also Rule 116.2, Local Rules of the United States District Court for the District of Massachusetts (eff. June 1, 2018) (Disclosure of Exculpatory Evidence) ("Exculpatory information is information . . . that tends to: (1) cast doubt on defendant's guilt as to any essential element in any count in the indictment or information; (2) cast doubt on the admissibility of

evidence that the government anticipates using in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731; (3) cast doubt on the credibility or accuracy of any evidence that the government anticipates using in its case-in-chief; or (4) diminish the degree of the defendant's culpability or the defendant's Offense Level . . .").

Materials that are "favorable to the defense" include far more than those that afford an "alibi or other complete proof of innocence," instead they simply mean those which "ten[d] to negate the guilt of the accused . . . or, stated affirmatively, support[t] the innocence of the defendant." *Ellison*, 376 Mass. at 22 n.9 (quotations omitted). In determining whether materials are "favorable to the defense" the prosecutor should ignore whether they are credible, reliable, or admissible. Determinations of credibility, reliability, and admissibility unavoidably place the prosecutor in the role of advocate, but when the prosecutor discharges the obligation under *Brady*, the prosecutor is acting as a neutral minister of justice rather than a partisan advocate. "Litigation strategy plays no role in this process." *CPCS v. AG*, 480 Mass. at 730-731.

Eliminating any requirement that *Brady* material must fully exculpate the defendant, or that it be credible, reliable, or admissible evidence is the modern trend. See, Rule 5.1, Rules of the United States District Court for the District of Columbia (July 2019) [Disclosure of Information]) ("This requirement applies regardless of whether the information would itself constitute admissible evidence."); N.Y. McKinney's Crim. Proc. L. § 245.20, *supra*.

This definition specifically does not use the term "material" to avoid confusion between the *Brady* disclosure obligation prior to trial and the remedy after trial for a failure to disclose exculpatory material. Whether items and information are subject to disclosure prior to trial depends only on whether they are favorable to the defense, without regard to whether they are material. "[O]nce the information is determined to be exculpatory, it should be disclosed—period." *Matter of a Grand Jury Investigation*, 485 Mass. at 650. Whether the remedy after trial for a *Brady* violation is a new trial can turn on whether the non-disclosed information was "material" in the sense of its effect on the outcome of the trial. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("'*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called '*Brady* material'—although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."); *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (*per curiam*) (internal quotations omitted) ("Evidence qualifies as material when there is any reasonable likelihood that it could have affected the judgment of the jury.").

Items and information that tend to perform one or more of these eight functions at any point in the case are favorable to the defense and subject to automatic discovery. As with all provisions of Mass. R. Crim. P. 14(b)(2)(B) and (C), disclosure is to be made without regard to the prosecutor's assessment of the material's admissibility. "Neither a prosecutor's decision to disclose nor a prosecutor's constitutional obligations under *Brady v. Maryland* are dependent on the ultimate admissibility of the information, but only on their tendency toward exculpating a defendant." *Graham*, 493 Mass. at 362 (internal citations omitted). Disclosure does not preclude the prosecutor seeking to exclude the items or information from trial.

14(b)(2)(B)(i)

*[This is a new section.]*

Materials that cast doubt on an aspect of guilt as to an element of any charged or lesser included offense are favorable to the defense. Naturally, materials suggesting the defendant did not commit the charged offense cast doubt on a fundamental aspect of guilt. *Gallarelli*, 399 Mass. at 19-23 (Brady violation from non-disclosure of police laboratory report showing that knife, seized from defendant shortly after victim was stabbed, had no blood on it); *Light*, 394 Mass. at 114 (Brady violation, in a prosecution for leaving scene of an accident, by police prosecutor's withholding results of chemical test showing paint chips on bumper of defendant's car differed from paint on the police cruiser she allegedly struck).

Materials may be favorable to the defense by indirectly contradicting an element of the offense. *Ellison*, 376 Mass. at 21 (Brady violation when Commonwealth failed to disclose codefendants' statements to authorities that were "favorable to the defendant" because they did not mention defendant's involvement in the crime); *Tucceri*, 412 Mass. at 402-404 (Brady violation from failure to disclose booking photograph showing mustachioed defendant arrested minutes after assault by perpetrator victim had described as clean shaven); *Daniels*, 445 Mass. at 401-404 (When a witness's identification of defendant as accomplice in a murder relied on her assumption about the identity of a masked codefendant in the crime, the Commonwealth was obligated to disclose information from an unrelated case implicating a third party as being the masked codefendant because it weakened the witness's identification of the defendant.).

Materials that cast doubt on an aspect of guilt concerning the defendant's required mental state or *mens rea* are also subject to disclosure. For example, in a first-degree murder case based on a theory of extreme atrocity or cruelty, evidence that a defendant was indifferent to or took pleasure in a victim's suffering is relevant to a finding of extreme atrocity or cruelty. Thus materials that call into question the defendant's indifference are favorable to

the defense. *Rodriguez-Nieves*, 487 Mass. at 177-178 (Inconsistent accounts by the only witness who testified the defendant laughed after the victim had been stabbed were exculpatory because witness's testimony was "strong evidence in support of the theory of extreme atrocity or cruelty"). See also *Commonwealth v. Themelis*, 22 Mass. App. Ct. 754, 761-762 (1986) (Statement to prosecutor by defendant charged with conspiracy to commit murder that he would not have killed intended victim was exculpatory and subject to disclosure despite prosecutor's belief that it was immaterial.).

14(b)(2)(B)(ii)

*[This is a new section.]*

Materials that cast doubt on the credibility or accuracy of any evidence the prosecutor may introduce at any point in the case are favorable to the defense. These include, but are not limited to, identification evidence or scientific evidence. Materials can cast doubt on the credibility or accuracy of identification evidence in multiple ways. A percipient witness's failure to identify a defendant is, of course, favorable to the defense. *Commonwealth v. Imbert*, 479 Mass. 575, 582 (2018) (Disclosure required of police interview notes of witnesses' failure to identify defendant in a photographic array). Changes in a percipient witness's identification details are favorable to the defense, as are inconsistencies in any prosecution witness's accounts, even if the changed account is more incriminating. *Commonwealth v. Vieira*, 401 Mass. 828, 832 (1988). (These disclosure obligations are separate from, and in addition to, the prosecutor's obligation to disclose a summary of identification procedures and written, recorded, or oral statements made in the presence of or by an identifying witness. See Rule 14(b)(1)(I).)

Information can cast doubt on a witness's credibility or the accuracy of their account whether it arises from a formal or informal identification procedure. In *Santana*, for example, a child witness to a murder testified during an initial voir dire to establish his competence to testify. After the judge found the child witness competent to testify, the prosecutor asked a state trooper to see if the witness recognized anyone in the courtroom. The witness recognized several people in the courtroom but did not recognize the defendant sitting at counsel table. Despite learning of this non-identification shortly after it occurred, the prosecutor called the child witness to testify the next day at trial without revealing to the defense his inability to identify the defendant the previous day. This violated the Commonwealth's "absolute obligation" to disclose nonidentification evidence, without regard to whether it could be explained. *Santana*, 465 Mass. at 292. When a witness identifies a defendant, items or information inconsistent with the identification naturally cast doubt on its accuracy and thus are subject to disclosure. *Tucceri*, 412 Mass.

at 403-404 (arrest photographs depicting rape defendant as mustachioed were exculpatory when victim and witness described perpetrator as being clean shaven).

Disclosure obligations similarly extend to identification procedures involving inanimate objects. Although the procedures properly may differ from those required for identification of persons, material that tends to cast doubt on such an identification is also favorable to the defense. *Commonwealth v. Simmons*, 383 Mass. 46, 51-52 (1981) (Due process could be violated by highly suggestive process of identifying inanimate object, but witness's out-of-court identification of automobile as the one in which she had been abducted not so suggestive as to be unfairly prejudicial); *Commonwealth v. Thomas*, 476 Mass. 451, 465-467 (2017) (Same, for identification of a firearm from a single photograph because this was unduly suggestive absent exigent circumstances, and recognizing identification could also violate common law of evidence).

Materials that cast doubt on the credibility of scientific evidence the prosecutor anticipates using, whether by impeaching the Commonwealth's expert or by contradicting their conclusions, are also favorable to the defense. "Evidence tending to impeach an expert witness for incompetence or lack of reliability falls within the ambit of the Commonwealth's obligations under Brady." *Sullivan*, 478 Mass. at 381 (Criminalist's failed proficiency tests cast doubt on his testimony by undermining his claims to rigorous training and testing offered to show his qualifications); *Martin*, 427 Mass. at 822-825 (Brady violation from prosecution's failure to disclose attempted confirmatory tests that were inconclusive or negative for the presence of LSD in decedent's body.). See also Mass. R. Crim. P. 14(b)(2)(C)(iii)(a) and (b).

#### 14(b)(2)(B)(iii)

*[This is a new section.]*

Materials that cast doubt on the credibility of witnesses the prosecutor may call are favorable to the defense. *Commonwealth v. Collins*, 386 Mass. 1, 8 (1982), citing *Baldwin*, 385 Mass. at 175 ("Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory."). "Generally, evidence that tends to impeach the credibility of a prosecution witness falls within the scope of Brady." Elspeth B. Cypher, *Criminal Practice and Procedure*, Massachusetts Practice Series, § 26.17.

Materials can cast doubt on a witness's credibility in a variety of ways. Prior instances in which a witness testified untruthfully naturally may call into question their credibility. *Graham*, 493 Mass. at 363 (Prosecutor must disclose adverse credibility determinations concerning members of the prosecution team notwithstanding their own disagreement with these determinations.) Materials may cast doubt on a witness's credibility by



impeaching a witness's testimony through contradiction. See *Tucceri*, 412 Mass. at 402-403 (Booking photograph of defendant arrested within minutes of the crime showing him with a moustache would have impeached victim's identification of him as the clean-shaven perpetrator.). See also *Gallarelli*, 399 Mass. at 19-23 (Police laboratory report showing that knife taken from defendant had no blood on it was exculpatory because it contradicted prosecution's theory that knife had just been used to stab the victim); *Daniels*, 445 Mass. at 401-402 (Prosecution's failure to disclose a statement implicating a third party as being the masked accomplice of defendant, which weakened victim's identification of defendant that was made based on his association with masked accomplice, violated Brady obligation); *Murray*, 461 Mass. at 20 n.9 (Police lieutenant's affidavit, based on information known to the prosecution team at the time of trial, that Commonwealth's witnesses were not merely a group of neighborhood friends but instead a gang that sold drugs and engaged in violent activity, and that the victim was actually an esteemed gang member, was potentially exculpatory because it could have impeached them by contradiction.).

Materials can also cast doubt on a witness's credibility by showing bias. *Murray*, *id.*, 461 Mass. at 20-21 (Evidence that witnesses were members of a gang, who rarely cooperated with police even when they were crime victims, could have shown their bias to protect one another in testifying for the prosecution.). Items or information suggesting a promise, reward, or inducement to a witness by the prosecution are prime examples of such materials. See Mass. R. Crim. P. 14 (b)(2)(C)(i)(a). "When the Commonwealth promises anything to a witness to induce him to testify, even though it be no more specific than 'consideration' in future proceedings, that communication is a promise, reward, or inducement that must be disclosed to the defendant." *Commonwealth v. Birks*, 435 Mass. 782, 787 (2002) (citing *Hill*, 432 Mass. at 716). Disclosure is required even when the benefits to a witness involve things other than non-prosecution or favorable disposition of charges. *Commonwealth v. Pasciuti*, 12 Mass. App. Ct. 833, 838 (1981) ("[W]e emphasize that the prosecutor who prepared the case should have disclosed to defense counsel the facts that the victim had been placed in protective custody shortly after the incident, that he was still in custody at the time of trial, that he was being furnished with living expenses by the Commonwealth, and, if the prosecutor was aware of it, that there had been some discussion with Federal authorities about the victim's being placed in the Federal witness protection program.").

Items or information suggesting a witness's bias in testifying must be disclosed even though the potential benefit comes from sources other than the prosecutor. For example, a victim witness pursuing a civil suit against the criminal defendant could naturally have a bias in testifying in the criminal case. If this suit is known to the prosecutor, its existence must be disclosed. *Elangwe*, 85 Mass. App. Ct. at 201 ("[P]rosecutor would have been

required to disclose the existence of the lawsuit as exculpatory evidence if she became aware of it.”).

Materials can cast doubt on the credibility of a witness by showing alternative explanations for the witness’s testimony apart from those offered by the prosecution. In *Commonwealth v. Baran*, 74 Mass. App. Ct. 256 (2009), for example, information that children who were alleged victims of sexual assault by the defendant had previously been sexually abused by unrelated third parties was not disclosed. The failure to disclose police reports and reports of child protective services agency’s investigation of these incidents “that, among other things, might have supported the inference that one or more of the complainants had been sexually abused by another—evidence that might have been used either for impeachment or to rebut allegations of age-inappropriate sexual knowledge,” violated the prosecution’s obligation to disclose exculpatory evidence. 74 Mass. App. Ct. at 298-99 & nn. 51-52.

14(b)(2)(B)(iv) and 14(b)(2)(B)(v)

*[These are new sections.]*

Items or information that cast doubt on the admissibility of any evidence or testimony the prosecutor may introduce, such as items or information that could support a motion to suppress or exclude evidence or testimony, weaken the prosecution’s case and are thereby favorable to the defense. Like materials that weaken the credibility of a prosecution witness, materials that impair establishing the required foundation for a witness’s testimony are favorable to the defense. Similarly, materials that impair establishing the required foundation for evidence, including authentication and chain of custody, are favorable to the defense.

The Supreme Judicial Court has cited with approval the definition of material favorable to the defense in the Local Rules of the United States District Court for the District of Massachusetts that includes such items and information. *CPCS v. AG*, 480 Mass. at 733 (citing Rule 116.2, Local Rules of the United States District Court for the District of Massachusetts (eff. June 1, 2018) (Disclosure of Exculpatory Evidence)). Local Rule 116.2(a)(2) defines exculpatory information (in part) as information that tends to: “(2) cast doubt on the admissibility of evidence that the government anticipates using in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be [subject to interlocutory appeal].” See also McKinney’s N.Y. Crim. Pro. L. Article 245.20(1.) (k)(vi) (Automatic discovery) (Prosecution shall disclose all evidence and information that tends to: “(vi) provide a basis for a motion to suppress evidence.”).

In cases involving searches or seizures by law enforcement, for example, information that officers lacked the requisite degree of suspicion for the challenged intrusion would be

favorable to the defense. In *Lewin*, 405 Mass. 566, the defendant was charged with murder for shooting a detective during the execution of a search warrant for drugs. The defendant showed that an informant who was a critical source of information for the warrant was relied upon with suspicious frequency for many search warrant affidavits and was likely fictitious. *Id.* at 582-583 (“One reasonable implication from [the officer’s] testimony is that [he] made up [the informant] as a means of obtaining search warrants in ostensible compliance with constitutional requirements concerning the issuance of search warrants.”). Accord, *Commonwealth v. Ramirez*, 416 Mass. 41, 51 (1993). A prosecutor’s recognition of such false or misleading testimony by its witnesses during a hearing must be promptly disclosed. *Hill*, 432 Mass. at 714 (“Regardless [of] whether the government has encouraged the false evidence of one of its witnesses, the prosecutor must advise the court of such false testimony.”).

14(b)(2)(B)(vi)

*[This is a new section.]*

Materials that tend to mitigate the charged offense or diminish the defendant’s culpability are favorable to the defense. Information that could suggest a defendant lacks the capacity to commit the offense, for example, is favorable to the defense. *Commonwealth v. Dowds*, 483 Mass. 498, 119 (2019) (Statement by defendant’s reentry case manager concerning the defendant’s having twice been struck by vehicles as a child and having suffered suspected head injury was potentially exculpatory information that should have been disclosed because it could have raised doubt as to his capacity to commit the offense). Materials that could mitigate the sentence are also favorable to the defense. *Commonwealth v. Capparelli*, 29 Mass. App. Ct. 926, 928 (1990) (Police affidavits in support of pen register applications that showed the defendant’s falling out with organized crime figures could have rebutted prosecutor’s assertions that the defendant was involved with organized crime and so should have been disclosed prior to sentencing as matter of due process). For defendants charged with first-degree murder, material that could suggest a verdict of second-degree murder would be more consonant with justice pursuant to G. L. c. 278, § 33E is favorable to the defense. *Dowds*, 483 Mass. at 119-120.

14(b)(2)(B)(vii)

*[This is a new section.]*

Materials that establish a defense theory or recognized affirmative defense, regardless of whether the defendant has presented such a theory or raised such an affirmative defense, must be disclosed. Items or information that support self-defense, for example, must be disclosed. When the identity of the first aggressor in a case is in dispute and the victim had a history of violence, specific acts of prior violent conduct may be admissible to

corroborate the defendant's claim that the victim was the first aggressor. *Commonwealth v. Adjutant*, 443 Mass. 649, 663-666 (2005). The victim's history of violence known to the prosecutor is thus subject to mandatory disclosure. *Murray*, 461 Mass. at 22. (Counsel should note that there are separate disclosure obligations for the defendant, and reciprocal disclosure obligations for the prosecutor, when a defendant intends to introduce evidence to support an allegation that the alleged victim was the first aggressor. See Rule 14.3(c).)

Information that tends to establish alibi is also favorable to the defense. *Donahue*, 396 Mass. at 596 (Failure to disclose FBI interviews with prospective alibi witness that supported defendant's alibi was Brady violation).

Information that tends to support a recognized affirmative defense, such as entrapment, is also favorable to the defense. In an entrapment defense, evidence of inducement by a government agent, and of the agent's relationship to law enforcement, is thus favorable to the defense. Similarly, information that tends to support a defendant's eligibility for exemption from prosecution or conviction for an offense is favorable to the defense. *Commonwealth v. Guardado*, 491 Mass. 666, 682-684 (2023) (Statutory exemption from firearm possession offense that criminalizes knowing possession of a firearm, without a license to carry, outside one's residence or place of business is treated as an affirmative defense when defendant offers sufficient evidence to establish firearm's location on defendant's place of business.). See also *Commonwealth v. Kelly*, 484 Mass. 53, 67 (2020) (Existence of a statutory exemption is equivalent to an affirmative defense.).

#### 14(b)(2)(B)(viii)

*[This is a new section.]*

Materials may be favorable to the defense if they corroborate a version of the facts advanced by the defense or question a material aspect of the prosecution's version of the facts, even if this aspect is not an element of the prosecution's case. For example, in a prosecution for a crime of violence, items that could support a theory of self-defense, such as a weapon in possession of a victim, are favorable to the defense. *Lam Hue To*, 391 Mass. at 308-209 (Brady violation in homicide when prosecutor failed to disclose that a knife with dried blood was found at the scene and that it belonged to the victim's relatives, as this could have changed defendant's investigation, trial strategy, or both.).

Motive is not typically an element of the prosecution's case, but information that disproves motive, or provides a motive for a third party to have committed the offense, is favorable to the defense and must be disclosed. In *Commonwealth v. Holbrook*, 482 Mass. 596 (2019), for example, email messages on a murder victim's computer could have supported the theory that the victim and a former roommate had been in a romantic relationship which

the victim had wanted to continue. Because the messages could have supported the defendant's theory of a third-party culprit (the former roommate) and impeached the former roommate's testimony that his relationship with the victim had not been intimate, they were subject to disclosure. *Holbrook*, 482 Mass. at 610-611.

Similarly, in *Smith*, 90 Mass. App. Ct. 261, the defendant was charged with armed home invasion and attempted murder on the theory that he had intended to kill a resident who had witnessed his committing a murder. The prosecution did not reveal, however, that another resident of the home was due to testify the next day in an unrelated homicide case. This information was favorable to the defense because it could have suggested a different person had a motive to kill a resident on the day of the crime and inferentially support defendant's theory that he had come only to buy drugs. *Id.*, at 266-267 & n.4. ("[I]t does not matter that motive was not a part of the Commonwealth's case. . . . If the Commonwealth failed to disclose [the other resident's] witness status, then the defendant was deprived of the ability to present evidence in support of his claim that he was only there to buy drugs."). *Id.* at 267.

A material aspect of the prosecution's version of the facts may be something innocent or innocuous, such as the specific location of a law enforcement witness, but information that calls such an aspect into question is favorable to the defense. In *McMillan*, 98 Mass. App. Ct. 409, for example, the prosecution's case alleging the defendant's hand-to-hand drug sales to a confidential informant relied on police observing the informant throughout the episode. Since the informant did not appear at trial and there was no recording of the transactions, any break in police surveillance could call into question the prosecution's account of the events. Although constant police observation of a controlled drug transaction is not an element of the offense, it was a material aspect of the prosecution's version of the facts in this case so any information that called into question the claim of unbroken surveillance was favorable to the defense. *Id.* at 415 (Because "the officers' vantage points determined whether they could have conducted continuous surveillance during the controlled purchase by the CI who, on previous occasions during the same joint investigation, had, despite claimed surveillance by officers of the task force, managed to engage in unlawful and unobserved conduct during other controlled purchases," the actual vantage points of the officers were material and exculpatory.).

Similarly, in *Commonwealth v. Bennett*, 43 Mass. App. Ct. 154 (1997), the disclosure obligation was violated in a robbery case when the prosecution failed to reveal two harassing phone calls the robbery victim had received the morning after the crime. While phone harassment is not an element of robbery, because the calls drew on photos from the victim's purse that had been taken in the robbery, they strongly suggested that the caller

was the robber. Because the calls were not collect and the defendant was incarcerated and so unable to make such calls at the time, the existence of the calls called into question a material aspect of the prosecution's theory. *Id.* at 162-163. The calls had to be disclosed notwithstanding the possibility that a third party might have found the discarded stolen purse, or that the harassing calls might have been unrelated to the robbery altogether. *Id.* at 162 ("The jury might consider the possibility . . . that the defendant, having committed the crime, discarded the pocketbook which happened to be picked up and then exploited by a stranger. Conceivably the caller was just one of [the victim's] mashers. But justice requires that a jury on retrial shall receive the information about the telephone calls and appraise and decide.").

Materials that corroborate the defense version of the facts are thereby favorable to the defense and must be disclosed. In *Merry*, 453 Mass. at 664, for example, a negligent vehicular homicide case, the opinion of the prosecution's accident reconstructionist that defendant's windshield had been damaged in the crash rather than from impact of his head was subject to disclosure, because it was consistent with the defendant's theory that he had suffered a seizure and fallen over before the impact. In *Commonwealth v. Green*, 72 Mass. App. Ct. 903 (2008), a possession with intent to distribute drugs case, the opinion of the prosecution's drug distribution expert relied heavily on the defendant's possession of \$1950 in neatly folded cash as evidence of his intent to distribute drugs. The defendant offered a witness who testified that the money actually belonged to her and that she had called the police station several times the day the defendant was arrested seeking its return. In rebuttal, the prosecutor offered two officers who testified that the call logs at the station showed no record of calls from the defendant's witness. A later search of police records, after the close of proof, revealed logs and multiple recordings of the witness's calls to the station, all of which had been subject to disclosure because they "directly related to the defendant's theory of the case." *Id.* at 904.

Materials can be favorable to the defense because they foreclose a theory of prosecution even if they do not prevent prosecution altogether. For example, in *Commonwealth v. Cooley*, 477 Mass. 448 (2017), the defendant was tried on a theory of felony murder based on the predicate felony of armed robbery. The prosecution theorized that the defendant committed the robbery with an unidentified person, and either person could have been the principal who shot the victim. A police report from an unrelated homicide in which a witness said a third party admitted being the shooter in Cooley's case was thus exculpatory and subject to disclosure, because it would have forced the prosecution to proceed exclusively on the theory that Cooley had been a coventurer. *Id.* at 454 n.4.

## **14(b)(2)(C) Examples**

*[This is a new section.]*

Because “a prosecutor cannot always know that a particular piece of evidence is or might be exculpatory,” Tucceri, 412 Mass. at 406, this section provides a non-exhaustive list of examples of items or information that are favorable to the defense. These examples are in five groups: material related to witnesses the prosecutor may call, material related to percipient witnesses the prosecutor may call, material related to expert witnesses the prosecutor may call, material related to persons the prosecutor does not anticipate calling, and information that suggests improprieties or shortcomings in the investigation or prosecution of the case. These examples are illustrative minima for items or information that are favorable to the defense.

### 14(b)(2)(C)(i)

*[This is a new section.]*

The nine types of items or information in Rules 14(b)(2)(C)(i)(a)-(i) are examples of materials that are favorable to the defense because they could affect the credibility of a witness the prosecution anticipates calling in the case-in-chief. These materials are subject to mandatory disclosure regardless of the prosecutor’s assessment of their credibility, reliability, or admissibility. Rule 14(b)(2)(A). These materials must be disclosed even if they have not been reduced to tangible form. *Id.* Thus, for example, information in any of these nine categories concerning anyone the prosecutor may call as a witness, whether learned in a formal interview or a passing remark, must be disclosed.

### 14(b)(2)(C)(i)(a)

*[This is a new section.]*

Promises, rewards, or inducements sought, requested by, or given by the government to any witness have long been subject to disclosure. “To be sure, the Commonwealth is obligated to provide the terms of any cooperation agreement with a witness the Commonwealth intends to call at trial.” *Commonwealth v. Goitia*, 480 Mass. 763, 772 (2018) (citing prior Mass. R. Crim. P. 14(a)(1)(A)(ix)). This section adds the additional requirement that such promises, rewards, or inducements “sought or requested” by prosecution witnesses must also be disclosed. An identical provision applicable to defense witnesses is in Rule 14.1(a). Disclosure of benefits that a prosecution witness may receive from third parties in connection with their testimony may be constitutionally required as well. *Commonwealth v. Miranda*, 458 Mass. 100, 108-112 (2010) (Due process required disclosure of witnesses’ anticipated contingent monetary rewards from a chamber of commerce for testifying in a murder trial that were verified by prosecutor.).

“Any communication that suggests preferential treatment to a key government witness in return for that witness’s testimony is a matter that must be disclosed by the Commonwealth.” Hill, 432 Mass. at 716 (citing Commonwealth v. Gilday, 382 Mass. 166, 175 (1980)). In Hill, the prosecutor’s failure to disclose her readiness “to give substantial consideration” to a key witness in return for his testimony violated the Brady obligation, even though the agreement and its terms were imprecise. As the Court explained, the lack of specificity does not affect whether the information must be disclosed:

*The fact that the terms of the agreement are not clearly delineated does not insulate the arrangement from disclosure. Indeed, the very nature of the situation may well require that its terms be vague as the consideration given may be dependent on the degree of cooperation. But even without precise terms, the government easily can induce a witness to believe that his treatment is dependent on his testimony. Thus, if any communication is reasonably susceptible of such an interpretation, it must be disclosed to the defense.*

Hill, 432 Mass. at 716-17.

Even an agreement that has been made only with a witness’s lawyer rather than with the witness directly must be disclosed. Gilday, 382 Mass. at 176-177 (“Although the [witness’s] attorney had agreed not to tell [the witness] of the arrangement, the implication of [the witness’s] cooperation with the Commonwealth should have been clear to the prosecutor. The prosecutor, from common experience, was chargeable with knowledge that [the witness] testified with expectations of leniency.”).

The benefit to the witness need not be specifically contingent on providing testimony that is favorable to the prosecution. Collins, 386 Mass. at 10 (“We do not think it necessary . . . that such an ‘arrangement’ be limited to situations where the favorable recommendation is explicitly hinged to receipt of favorable testimony.”). Material suggesting either that a witness will receive or will forego a benefit due to their testimony must be disclosed. “In short, any statement which reasonably implies that the government . . . is likely to confer or withhold future advantages . . . depending on the witness’s cooperation” must be disclosed. Commonwealth v. O’Neil, 51 Mass. App. Ct. 170, 179-80 (2001) (citing Commonwealth v. Schand, 420 Mass. 783, 792 (1995)). Compare Commonwealth v. Freeman, 442 Mass. 779, 737 (2004) (No violation from failure to disclose agreement that was not finalized when prosecutor had disclosed to defense counsel the sentence that the Commonwealth would probably recommend for the witness after the witness testified truthfully but cautioned that the agreement had not yet been finalized).



Anything provided by the state to a witness that “could reasonably be interpreted as a promise, reward, or inducement” must be disclosed, regardless of the purpose for which it was provided. *Commonwealth v. Smith*, 456 Mass. 476, 484 n.2 (2010) (Provision by police of six months of hotel accommodations to two witnesses, even if done for the witnesses’ own protection, had to be disclosed as a promise, reward, or inducement). See also *Drumgold v. Commonwealth*, 458 Mass. 367, 373-374 (2010) (Prosecution acknowledged food and hotel accommodations provided by police to “significant witness” and promises concerning pending cases were subject to disclosure); *Commonwealth v. Watson*, 393 Mass. 297, 299-301 (1984) (Police promise to help move eyewitness who made identification properly disclosed as an “understanding or agreement”). Compare *Commonwealth v. Lay*, 63 Mass. App. Ct. 27, 33-34 (2005) (A detective’s attendance at a cookout with a prosecution witness several months before the incident about which the witness testified and giving the witness money to buy beer for the cookout was not a promise, reward, or inducement for testimony concerning an event that had yet to occur,). Rewards given by any entity of the state in exchange for a witness’s cooperation in a prosecution qualify as favorable to the defense. *Commonwealth v. Reed*, 417 Mass. 558, 563 n.5 (1994) (Greater release privileges for patient at state forensic mental hospital, if given in exchange for his cooperation with the prosecution, would require disclosure despite their being given by the Department of Mental Health).

A witness’s subjective hope or expectation of leniency or benefit from the prosecution, by contrast, is not subject to disclosure unless the prosecutor is aware of it. *Commonwealth v. Johnson*, 486 Mass. 51, 65-66 (2020) (The “mere fact that a witness may have expected to, and did, receive favorable treatment after the defendant’s trial, standing alone, does not constitute an inducement.”) (internal quotations omitted). However, when a prosecutor knows that a witness hopes or expects to receive leniency or favorable treatment from the government, even if there is not an agreement for such a benefit, information concerning that hope or expectation is favorable to the defense and must be disclosed.

*Commonwealth v. Caldwell*, 487 Mass. 370, 375-376 & n.8 (2021) (The prosecutor’s knowledge that a jailhouse informant who obtained a confession from the defendant had previously obtained a jailhouse confession in an unrelated case, after which his sentence was revised and he was released two and-one-half months early, should have been disclosed because it could have shown the informant’s anticipated beneficial resolution of his pending cases.). When a witness seeks or requests beneficial treatment from the prosecutor, unless the prosecutor unequivocally refuses this request the prosecutor is necessarily aware of the witness’s subjective hope or expectation so the fact of the request is favorable to the defense and must be disclosed.

Commonwealth v. Chicas, 481 Mass. 316 (2019), illustrates disclosure requirements for information that might constitute an inducement. In Chicas, several prosecution witnesses were undocumented immigrants, and the prosecution “disclosed that during trial preparation, a detective told one of those witnesses that the detective would be willing to write him a letter if he decided to apply for United States citizenship in the future.” Id. at 319. “At that point, that witness’s citizenship status was relevant to a potential bias in his testimony.” Id. at 321. This “appearance of a quid pro quo with one witness” suggested there may have been inducements to other witnesses. Id. When the defendant demonstrates a possibility of bias, a judge cannot bar all inquiry into the subject. Commonwealth v. Tam Bui, 419 Mass. 392, 400 (1995). However, once the other witnesses denied such conversations with the prosecution team, the judge could properly find there was no basis for exploring their potential bias concerning their citizenship status. Chicas, 481 Mass. at 321.

14(b)(2)(C)(i)(b)

*[This is a new section.]*

Criminal records of any witness the prosecutor may call are favorable to the defense because criminal convictions may affect the witness’s credibility. While the defendant may receive any record of court activity for prosecution witnesses that is maintained by the Probation Service under Rule 14.2(b), this rule provides that any other criminal record not reflected in the Probation Service’s record of court activity must be provided. Because criminal convictions from any jurisdiction may be admissible, all such criminal records are favorable to the defense and must be disclosed if they are in the possession, custody, or control of the prosecutor, prosecuting office, or any member of the prosecution team. Attorney General v. Pelletier, 240 Mass. 264, 310 (1922) (admissibility of Federal convictions); City of Boston v. Santosuosso, 307 Mass. 302, 330 (1940) (admissibility of out-of-state convictions); Commonwealth v. Gagnon, 16 Mass. App. Ct. 110, 130-132 (1983) (admissibility of foreign convictions). Any such criminal records must be disclosed without regard to whether the underlying offense involved dishonesty or false statement. Commonwealth v. Smith, 450 Mass. 395, 407 (2008).

The traditional theory under which a conviction is thought to affect credibility is “that a witness’s earlier disregard for the law may suggest to the fact finder similar disregard for the courtroom oath.” Commonwealth v. Harris, 443 Mass. 714, 720 (2005) (internal quotations omitted). Disclosure is required without regard to whether any prior convictions, adjudications, or dispositions would be admissible. Mass. R. Crim. P. 14(b)(2)(A). For admissibility of prior convictions, see G. L. c. 233, § 21 and G. L. c. 119, § 60; Mass. G. Evid. § 609 (2021).

14(b)(2)(C)(i)(c)

*[This is a new section.]*

Criminal cases pending against a prosecution witness at any relevant time may provide an incentive for a witness to cooperate with the prosecution and thereby show bias.

Commonwealth v. Martinez, 384 Mass. 377, 380 (1981) (Cross-examination of prosecution witness's pending appeal concerning either promise or expectation of leniency was proper to show bias); Commonwealth v. Connor, 392 Mass. 838, 841 (1984) (The "pendency of criminal charges might have inspired hope of lenity and fear of punishment if such lenity were not obtained."); Commonwealth v. Haywood, 377 Mass. 755, 760-761 (1979) (Evidence of prosecution witness's otherwise confidential juvenile or criminal records, including arrest records for charges pending at time of the witness's testimony, may be admissible to show bias or motivation to seek favor from the government subject to showing of materiality). Information concerning pending criminal charges, including arrest records for pending charges, is thus favorable to the defense and must be disclosed without regard to its admissibility at trial. Similarly, charges that were pending against a prosecution witness when the witness provided information to the prosecution team relevant to the case against the defendant must be disclosed even if the charges were resolved prior to the start of automatic discovery in the defendant's case.

Information concerning pending charges in other jurisdictions is subject to disclosure. Commonwealth v. Rodwell, 394 Mass. 694, 699 (1985) (That the witness's "past beneficial cooperation with the authorities may have involved criminal charges pending in counties other than the county in which the defendant was tried does not make irrelevant his understanding that by cooperation he could obtain favorable treatment from the Commonwealth."). See generally Commonwealth v. McGhee, 472 Mass. 405, 424-425 (2015); Commonwealth v. Meas, 467 Mass. 434, 449-450 (2014). Evidence of bias due to a witness's pending charges, or probation status that could be violated, may be admissible under the right of confrontation as well. Davis v. Alaska, 415 U.S. 308, 315-318 (1974); Commonwealth v. Ferrara, 368 Mass. 182, 185-189 and n.4 (1975) (noting it was not crucial whether the witness was then on probation because the "possibility of excessive desire by [the witness] to please the police and prosecutor was present").

14(b)(2)(C)(i)(d)

*[This is a new section.]*

Any discrepancies or inconsistencies between prior statements of a prospective witness known to the prosecutor are favorable to the defense. "Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory." Collins, 386 Mass. at 8, citing Baldwin, 385 Mass. at 175. See also Baran, 74 Mass. App. Ct. at 298 (Brady violation

from failure to disclose multiple unedited versions of videotaped interviews of alleged victims of sexual abuse that “reveal[ed] significant vacillation and uncertainty on the part of many, if not all, of the children interviewed, as well as considerable material from which it could be inferred that the children’s testimony was coached.”); *Merry*, 453 Mass. at 659-660 (An accident reconstructionist’s opinion, stated to one prosecutor, that damage to defendant driver’s windshield did not come from his head striking it, and the conclusion that defendant was not sitting up at time of the accident, were exculpatory because they supplemented the witness’s statement to a different prosecutor concerning source of windshield damage.). (For the definitions of “written statement” and oral statement,” see Rule 14(b)(3)(A) and (B).)

Inconsistent statements are favorable to the defense even if both statements are inculpatory, and even if the present account or testimony is more incriminating to the defendant. *Commonwealth v. Viera*, 410 Mass. 828, 832 (1988) (“Although the evidence was more incriminating than the earlier statements, it was exculpatory in the sense that the variance with the previous statements permitted challenge to the credibility of a key prosecution witness.”) (internal quotations omitted); *Rodriguez-Nieves*, 487 Mass. at 177-178 (The murder victim’s wife’s “statements, while in and of themselves inculpatory, also were exculpatory because they were not reflected in her report of the events to police on the day of the stabbing. The difference in the two statements provided a basis upon which to impeach [victim’s wife], who was the Commonwealth’s key witness on the issue of extreme atrocity or cruelty.”); *Vaughn*, 32 Mass. App. Ct. at 439-440 (Brady violation from police officer’s changed testimony, first disclosed at trial, that he had found three sets of footprints outside home that was burglarized rather than the two sets he had noted in his report and to which he had testified before the grand jury.). Compare *Smith*, 450 Mass. at 408-409 (No violation from unanticipated change in ballistics’ testimony on cross-examination), with *Gilbert*, 377 Mass. at 892-894 (Prosecutor’s failure to disclose the oral statement of a case-in-chief witness that his previous written statement to police was incomplete, before the witness’s trial testimony, violated disclosure obligation, and prosecutor’s directive that witness should “tell the truth” did not substitute for disclosure). The Supreme Judicial Court has explained that, for critical witnesses, the impeachment value of even minor discrepancies is high. *Murray*, 461 Mass. at 23 n.10 (“[W]e emphasize that in the case of important witnesses, even minor bases for impeachment are exculpatory.”). See also *Commonwealth v. Pope*, 489 Mass. 790, 803 (2022) (New trial ordered where inconsistencies between Commonwealth’s key witness’s previously undisclosed statements to police and his in-court statements about his girlfriend’s name and how he went to her home after the crime were “quite notable.”).

14(b)(2)(C)(i)(e)

*[This is a new section.]*

Inconsistencies between statements of any witnesses a prosecutor may call are favorable to the defense. Vaughn, 32 Mass. App. Ct. at 437-440 (Brady violation from police officer's testimony he found three sets of footprints outside home that was burglarized, rather than the two sets that two other responding officers described finding). Just as inconsistencies between prior statements or testimony of a prosecution witness are favorable to the defense (Mass. R. Crim. P. 14(b)(2)(C)(i)(d)) so too are inconsistencies between statements of different witnesses the prosecution may call. (For the definitions of "written statement" and oral statement," see Rule 14(b)(3)(A) and (B).)

Vaughn illustrates the prosecutor's continuing obligation to disclose material favorable to the defense, even if it is learned well after discovery or shortly before trial. Vaughn, 32 Mass. App. Ct. at 440 ("To make matters worse, the prosecution appears to have been aware of the new evidence in advance and cleverly to have prompted this testimony while [the witness] was on the stand. The Commonwealth's behavior in failing to disclose such a material change in testimony amounts to much more than a mere error of judgment or an instance of inadvertence or carelessness by the prosecutor."). Cf. Commonwealth v. Ellerbe, 430 Mass. 769, 780-781 (2000) (An officer's first-time disclosure at trial that defendant, charged with drug possession and offering a \$10,000 gift to a police officer, had told officer where she could obtain money for the gift did not violate prosecution's disclosure obligation where officer did not change testimony from prior account of the matter.).

14(b)(2)(C)(i)(f)

*[This is a new section.]*

Information that shows bias or prejudice against a defendant on the part of a witness the prosecution may call is favorable to the defense because it can affect the witness's credibility. Tam Bui, 419 Mass. at 400 ("The right of a criminal defendant to cross-examine a prosecution witness to show the witness's bias, and hence to challenge the witness's credibility, is well established in the common law, in the United States Constitution (Sixth Amendment), and in the Constitution of the Commonwealth (art. 12 of the Declaration of Rights)."). Disclosure is required without regard to whether the information is admissible.

"Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest." United States v. Abel, 469 U.S. 45, 52 (1984). See also

Commonwealth v. Martin, 434 Mass. 1016, 1017 (2001) (citing Martinez, 384 Mass. at 380); Mass. G. Evid. §611(b)(2). Witnesses who are crime victims routinely have a bias against the defendant due to what they believe was the defendant's charged conduct, but the bias at issue here must come from some other source.

For example, bias or prejudice against the defendant may arise from antipathy due to prior actions of the defendant or to a witness's prior encounters with the defendant.

Commonwealth v. Ahearn, 370 Mass. 283, 286-87 (1976) (Error to bar inquiry concerning police officers' knowledge that defendant charged with assault and battery on the officers had sought civilian complaints against them before they decided to file charges against him); Martin, 434 Mass. at 1017 (Error to bar inquiry concerning assault complainant's knowledge defendant had obtained criminal complaints against her that could show complainant's bias in seeking her own complaints against the defendant); Commonwealth v. Magdalenski, 471 Mass. 1019, 1020 (2015) (Error to bar inquiry concerning complainant's knowledge that defendant had sought complaint against alleged victim); Commonwealth v. Kindell, 84 Mass. App. Ct. 183, 189 (2013) (Error to bar inquiry into prosecution witness's hostility toward defendant due to his belief that she was responsible for his stepson's incarceration).

Bias could arise from a witness's interest in the outcome of the case. Commonwealth v. Elliot, 393 Mass. 824, 826-830 (1985) (Error to bar all questioning concerning complainant's possible suit against defendant's employer for injuries she suffered from assault at defendant's workplace that could create a financial motive for complainant to testify falsely); Elangwe, 85 Mass. App. Ct. at 201 (Existence of victim's pending civil suit against defendant, if known by prosecutor, must be disclosed).

Bias or prejudice could also arise from a witness's views or attitudes toward a group with which the defendant is affiliated or of which the defendant is a member. Commonwealth v. Hinds, 487 Mass. 212, 224-225 (2021) (Error to exclude evidence of assault victim's tattoo suggesting affiliation with white supremacist movement as it could support Black defendant's self-defense theory that assault was racially-motivated); Commonwealth v. Moorer, 431 Mass. 544, 547-548 (2000) (Error to preclude defense inquiry concerning white victim's upbringing under apartheid in then-Rhodesia because "the victim's comment that the [Black] defendant's face did not quite fit the MIT cap he was wearing created at least a remote possibility that he was racially biased."). Information about a witness's attitudes concerning group-affiliation of a defendant is thus favorable to the defense. Caldwell, 487 Mass. at 376 (Brady violation from failure to disclose fact that jailhouse informant in rape case had previously obtained confession from a different defendant charged with rape in

an unrelated case because it could have supported “theory that the witness was so biased against individuals accused of rape that he would go to any lengths to convict them.”).

14(b)(2)(C)(i)(g)

*[This is a new section.]*

Information that a witness the prosecution may call has committed any crime is favorable to the defense because it may show a motivation to seek favor with the government. Haywood, 377 Mass. at 760 (A “criminal defendant is entitled, as of right, to reasonable cross-examination of a witness for the purpose of showing bias, particularly where that witness may have a motivation to seek favor with the government.”) (internal quotations and citations omitted). Disclosure is required without regard to admissibility of the information. See also Martinez, 384 Mass. at 380-381 (bias from prosecution witness’s pending appeal); Commonwealth v. Graziano, 368 Mass. 325, 329-330 (1975) (bias from critical prosecution witness’s actions that made him a likely suspect in defendant’s case).

Information that a prosecution witness has committed a crime, even an uncharged crime, may also be favorable to the defense if it shows bias or prejudice against the defendant. Commonwealth v. Aguiar, 400 Mass. 508, 514-515 (1987) (Reversible error to prevent defendant charged with murder from introducing evidence that prosecution’s key witness and the victim were drug dealers whom the defendant had warned to stop dealing drugs in the community because defendant “had a right to have the whole relationship presented to the jury.”). Apart from its use to show bias or prejudice, information that a prosecution witness has committed a crime may be favorable to the defendant in other ways, for example by corroborating a defendant’s claim of self-defense when the identity of the first aggressor is in dispute. Adjutant, 443 Mass. at 663-666; Murray, 461 Mass. at 22. To be subject to disclosure, this information must be known to the prosecutor, the prosecuting office, or a member of the prosecution team.

Even information concerning crimes for which a prosecution witness could not be charged is favorable to the defense and must be disclosed. In Matter of a Grand Jury Investigation, 485 Mass. at 647, 651, for example, police officers admitted in grand jury testimony that they had falsified use-of-force reports concerning a fellow officer’s misconduct. Even though this testimony was given under transactional immunity, so the officers could not be prosecuted for the crimes they described committing, their admissions were nevertheless subject to disclosure as Brady material in any case in which they might be witnesses. 485 Mass. at 654- 656. Similarly, in Graham, 493 Mass. 348, the Court held that the prosecution could not “shirk its disclosure obligation” in instances of suspected police misconduct involving multiple officers when specific acts could not be attributed to particular

individuals. Instead, disclosure of the information was required “in any cases involving any of the officers who could be the possible offenders.” *Id.*, 493 Mass. at 365.

14(b)(2)(C)(i)(h)

*[This is a new section.]*

Any information concerning misconduct by law enforcement witnesses the prosecution may call is favorable to the defense because it could affect these witnesses’ credibility. *Graham*, 493 Mass. at 363 (Prosecutor must disclose adverse judicial determinations of credibility concerning members of the prosecution team); *Matter of a Grand Jury Investigation*, 485 Mass. at 657-658 (Prosecutor’s conclusion that officer lied to conceal unlawful use of force or about defendant’s conduct had to be disclosed to defense counsel in any case in which the officer was a potential witness or prepared an investigative report). Any such information in a database or list maintained by or available to the prosecuting office must be disclosed. The Supreme Judicial Court has endorsed the creation of policies that would collect this information. 485 Mass. at 660 & n.16.

Lists or databases (variously called “Brady lists,” “Brady-Giglio lists” or “Do not call lists”) are one tool to assist prosecutors who often work with law enforcement personnel from various departments in discharging their disclosure obligations. Rachel Moran, 107 Minn. L. Rev. 657, 674-675 (2022). See also, *Tracking Police Misconduct: How Prosecutors Can Fulfill Their Ethical Obligations and Hold the Police Accountable*, Inst. For Innovation in Prosecution (July 2021), (Describing database as “best way” to ensure prosecutor’s office complies with its ethical and legal obligations under Brady that also enables prosecutors to more easily assess credibility of law enforcement witnesses, avoid surprise from defense-based databases, and demonstrate readiness to hold law enforcement witnesses accountable.).

14(b)(2)(C)(i)(i)

*[This is a new section.]*

Information concerning any condition of a witness that may impair the witness’s testimonial capacity is favorable to the defense and must be disclosed. *Commonwealth v. Daley*, 439 Mass. 558, 564 (2003) (A witness may “be impeached by evidence challenging his testimonial faculties (e.g., ability to perceive the events or remember them accurately)”); *Commonwealth v. Caine*, 366 Mass. 366, 369-370 (1974) (“[M]ental impairment, as well as habitual intoxication and drug addiction, may be the subject of proper impeachment if it is shown that such factors affect the witness’s capacity to perceive, remember, and articulate correctly.”). Disclosure is required without regard to the admissibility of evidence of the condition.



For example, a “witness’s use of illegal drugs, legally prescribed medication, or alcohol at the time of the events concerning which [the witness] was testifying, or evidence of a pattern of such drug or alcohol addiction, if it would impair the witness’s ability to perceive and to remember correctly, is admissible on cross-examination to attack the witness’s credibility.” *Commonwealth v. Carrion*, 407 Mass. 263, 273-274 (1990). Compare *Commonwealth v. Bresilla*, 470 Mass. 422, 441 n.8 (2015) (Identification witness’s hospitalization six weeks before incident for treatment of psychiatric illness and chemical dependency, during which witness complained of intermittent blurred vision, showed inconsistent memory and engaged in unstable behavior twice requiring chemical restraint all could have cast doubt on witness’s ability to accurately perceive and describe events), with *Commonwealth v. Laguer*, 20 Mass. App. Ct. 965, 1063 (1985) (Medication administered when the witness made an identification was properly subject of cross examination, but witness’s prior psychiatric history not properly considered without expert testimony that history would have exacerbated effect of medication on witness’s ability to perceive or recall attacker).

14(b)(2)(C)(ii)

*[This is a new section.]*

Percipient witnesses may create material that is favorable to the defense by failing to identify the defendant in an identification procedure or by making statements that are inconsistent with their own statements concerning the alleged incident or with the defendant’s conduct, or with statements of other witnesses about the alleged incident. Rules 14 (b)(2)(C)(ii)(a) - 14 (b)(2)(C)(ii)(c). These examples of material favorable to the defense are in addition to the automatic disclosure that must be provided summarizing any identification procedures and statements made in connection with them. Rule 14 (b)(1)(I). (For the definitions of “written statement” and oral statement,” see Rule 14 (b)(3)(A) and (B).)

14(b)(2)(C)(ii)(a)

*[This is a new section.]*

A percipient witness’s failure to identify the defendant in an identification procedure is favorable to the defense. *Santana*, 465 Mass. at 290-292 (The prosecutor’s failure to disclose a percipient witness’s inability to identify defendant was a “failure of constitutional dimension.”). A percipient’s witness’s failure to identify the defendant must be disclosed even if the identification procedure was informal. In *Santana*, for example, after a percipient witness testified in a pretrial hearing to establish the witness’s competence, the prosecutor asked an officer to see if the witness had recognized anyone in the courtroom. When the witness named several people in the courtroom but did not

name the defendant, this lack of identification was subject to disclosure. Id. at 291. See also Imbert, 479 Mass. at 582 (Failure to disclose percipient witness's inability to identify defendant in a photographic array was error, albeit not prejudicial). Even if the witness is not asked to make an in-court identification and does not testify to having previously made an identification, the fact of the prior failure to identify the defendant must be disclosed when the witness testifies to having perceived the crime. Id. The witness's status as a percipient witness necessarily makes any failure to identify the defendant, even if the witness does not testify to having identified the defendant, favorable to the defense.

14(b)(2)(C)(ii)(b)

*[This is a new section.]*

Statements of a percipient witness regarding either the alleged incident or the alleged conduct of the defendant that are inconsistent are favorable to the defense. As with all inconsistent statements, even inculpatory statements must be disclosed, as it is the inconsistency between the statements rather than their substance that is favorable to the defense. Rodriguez- Nieves, 487 Mass. at 175-77 (Prosecutor's failure to disclose percipient witness's changed account of stabbing victim's last statements and of defendant's response to victim was "indisputable" Brady violation); Connor, 392 Mass. at 850-851 (Cooperating witness's statement to prosecutor that he had stabbed murder victim in the head with a screwdriver and rotated it become exculpatory when the witness testified to having stabbed victim without rotating screwdriver and to not having told anyone he had done so.).

14(b)(2)(C)(ii)(c)

*[This is a new section.]*

Statements of a percipient witness about the alleged incident that are inconsistent with statements of any other witness are favorable to the defense and must be disclosed, without regard to whether the prosecutor anticipates calling the percipient witness. Rodriguez-Nieves, 487 Mass. at 178 (Percipient witness's changed account of stabbing victim's last statements and of defendant's laughing response to victim dying were material exculpatory evidence because no other percipient witness testified to them.).

14(b)(2)(C)(iii)

*[This is a new section.]*

Disclosure obligations concerning expert witnesses are set forth in several sections of the Rules.

Automatic discovery of experts and expert opinions that are investigative materials, other than those concerning the defendant's mental condition, is governed by Rules 14(b)(1)(F) and 14(b)(1)(H).

The prosecutor's disclosure obligations for automatic discovery of items and information relating to experts that are favorable to the defense are set forth in Rules 14(b)(2)(B)(ii) and 14(b)(2)(C)(iii).

The disclosure of experts called by the prosecutor or the defendant concerning the defendant's mental condition at the time of the alleged crime, or expert testimony concerning the defendant's mental condition at any stage of the proceeding, is governed by Rule 14.4.

Reciprocal discovery from the defense concerning experts and expert opinion, with the exception of experts concerning the defendant's mental condition, is governed by Rule 14.1(a).

14(b)(2)(C)(iii)(a)

*[This is a new section.]*

Whenever an expert offered by the Commonwealth conducts examinations, tests, or experiments in connection with a case, results of these that are either inconclusive or inconsistent with the expert's report, conclusions, or testimony is favorable to the defense. *Martin*, 427 Mass. at 822-823 (In a murder case based on alleged tainting of victim's food with LSD to produce his heart attack, the failure to disclose inconclusive and inconsistent results of confirmatory tests for presence of LSD in the victim's body fluids violated prosecutor's obligation to disclose exculpatory evidence.). Naturally, test or examination results, either primary or confirmatory, that are inconsistent with the expert's report are favorable to the defense and subject to disclosure. *Commonwealth v. Gaston*, 86 Mass. App. Ct. 568, 573 & n.5 (2014) (State laboratory chemist's affirmative representations of substances as illegal that she had in fact not tested were "exculpatory because they undermined the foundation of the defendant's prosecution and, in turn, triggered the requirement of prosecutorial disclosure."). This disclosure obligation is in addition to the automatic discovery required by Rule 14(b)(1)(F) and 14(b)(1)(H) of intended expert opinion evidence and reports, and reports of scientific tests or experiments that pertain to the case.

14(b)(2)(C)(iii)(b)

*[This is a new section.]*

The credibility of an expert's examinations, tests, and experiments depends upon the reliability of the expert's methods and processes. *Sullivan*, 478 Mass. at 381 ("Evidence

tending to impeach an expert witness for incompetence or lack of reliability falls within the ambit of the Commonwealth's obligations under Brady." ). Deficiencies in the performance of examinations, tests, or experiments impeaches that credibility, whether the deficiencies are in the expert's own work or that of the testing facility or laboratory used by the expert. Id. at 381-382 (State police crime laboratory criminalist's failure of proficiency tests was exculpatory information even though the criminalist's involvement in the case at issue was limited to evidence collection). See also Hallinan, 491 Mass. at 740-741 (State police office of alcohol testing's failure to disclose internal documents showing failed certifications of alcohol breathalyzer machines violated disclosure obligations.). Information concerning operating deficiencies in the laboratory facility or equipment must be disclosed. Neal, 392 Mass. at 14 n.12 ("Information available to the Commonwealth from a manufacturer of breathalyzer equipment or other sources that specific lots of test or reference ampules may be defective, or that the accuracy of breathalyzer results may be otherwise impaired . . . must be disclosed to a defendant." ).

Such deficiencies may also be exculpatory by showing shortcomings in the investigation. Id. at 382 (Criminalist's failure of proficiency tests also exculpatory through potential support of a defense under Commonwealth v. Bowden, 379 Mass. 472 (1980), that shortcomings in investigation or failure to pursue leads raises reasonable doubt). See also Commonwealth v. Hernandez, 481 Mass. 189, 194-196 (2019) (unsatisfactory proficiency tests of state police laboratory chemist who testified as crime scene supervisor were exculpatory). This information may also be subject to disclosure under Mass. R. Crim. P. 14(b)(2)(C)(v)(b).

14(b)(2)(C)(iv)

14(b)(2)(C)(iv)(a)

*[This is a new section.]*

Advocates properly select witnesses who support their theory of the case and omit those who do not support it. Written or oral statements of persons who the prosecution does not anticipate calling can nevertheless be favorable to the defense if they are inconsistent with statements of persons the prosecutor does anticipate calling. Statements pertaining to the case, by anyone, that are inconsistent with statements of a witness the prosecutor may call are favorable to the defense. By contrast, statements of persons the prosecutor does not anticipate calling that are consistent with statements of persons the prosecutor anticipates calling are not subject to disclosure as exculpatory evidence. Compare Commonwealth v. Bockman, 442 Mass. 757, 766-767 n.10 (2004) (Opinions of state police trooper concerning comparison of fingerprints from scene with defendant's prints were not subject to disclosure because they were identical to those of FBI print analyst who was

called and whose opinions were fully disclosed to defense) with Green, 72 Mass. App. Ct. 903 (Recordings of defense witness's calls to police department claiming money defendant possessed when was arrested should have been disclosed prior to trial because they supported defendant's claim that money belonged to the witness).

14(b)(2)(C)(v)

14(b)(2)(C)(v)(a)

*[This is a new section.]*

Information showing a third party, rather than the defendant, may have committed the crime "is a time-honored method of defending against a criminal charge." Commonwealth v. Rosa, 422 Mass. 18, 22 (1996) (internal quotations omitted). "A defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it." Commonwealth v. Lawrence, 404 Mass. 378, 387 (1989) (quoting Commonwealth v. Harris, 395 Mass. 296, 300 (1985)). Indeed, if such "evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility." Commonwealth v. Morgan, 460 Mass. 277, 291 (2011). See also Commonwealth v. Conkey, 443 Mass. 60, 66-70 (2004) (In homicide suggestive of sexual assault, defendant's evidence that victim's landlord had lengthy history of sexual aggression toward women, including other tenants and potential tenants, from seven years to a few months before the murder, admissible as third-party culprit evidence); Commonwealth v. Keizer, 377 Mass. 264, 266-268 (1979) (Evidence of similar robbery three days after robbery for which defendant was charged, in the same vicinity by the same number of people of similar description that defendant could not have committed should have been admitted as third-party culprit evidence).

14(b)(2)(C)(v)(b)

*[This is a new section.]*

Items or information showing the inadequacy of investigation by police, including "failure of the authorities to conduct certain tests or produce certain evidence," can be a permissible ground on which to build a defense and therefore must be disclosed. Bowden, 379 Mass. at 485-486. Accord Commonwealth v. Person, 400 Mass. 136, 140 (1987) ("The defendant may expose any deficiencies in the police investigation. He may argue to the jury that, had the police done certain aspects of their investigation differently, it would have supported his defense."); Pope, 489 Mass. at 804-806 (Prosecutor's preliminary field report and case memorandum reflecting police skepticism about version of events given by Commonwealth's sole percipient witness should have been disclosed because they showed inconsistencies in witness's account; "very existence of [these] documents . . . calls into question aspects of the Commonwealth's investigation or preparation for trial.")

(2022); Commonwealth v. Reynolds, 429 Mass. 388, 390-391 (1999) (Reversible error where murder defendant was precluded from introducing evidence that police failed to pursue leads from two tipsters that major crime organization's "lieutenants" had argued with victim concerning money he owed them the night of his death); Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009) ("The inference . . . from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence."); Sullivan, 478 Mass. at 382 (State police laboratory criminalist's failure to pass proficiency tests was exculpatory because it bolstered Bowden defense by allowing defendant to attack thoroughness of investigation); Commonwealth v. Moore, 480 Mass. 799, 808-809 (2018) (Audio recordings of police officers relaying perpetrators' descriptions that did not match defendant properly admissible as Bowden evidence.).

Information showing egregious government misconduct in the investigation or prosecution of the case is favorable to the defense and must be disclosed. Manning, 373 Mass. 438 (Officer's telephone call to defendant disparaging defense counsel and seeking defendant work as an informant violated defendant's right to counsel and right to fair trial and necessitated dismissal of indictment with prejudice); Lewin, 405 Mass. 566 (Officer's suspiciously frequent reliance upon single likely non-existent informant created inference of perjurious and fraudulent conduct by police officer that defendant can show at trial, but did not require dismissal because it did not preclude defendant receiving a fair trial). See also Commonwealth v. Fontaine, 402 Mass. 491, 497-498 (1988) (Videotaping conversations between defendant and counsel); Commonwealth v. Salman, 387 Mass. 160, 165-167 (1982) (Evidence suggesting multiple indictments relying on one detective's testimony may have been obtained through knowing and intentional use of false and misleading testimony). Compare Commonwealth v. Hine, 393 Mass. 564, 571 (1984) (Officer's forgery of defendant's signature on Miranda card improper but did not prejudice defendant who orally waived Miranda rights); Commonwealth v. Teixeira, 76 Mass. App. Ct. 101, 105 (2010) (Detective's hostile encounter with defendant the day before defendant's trial involving detective's niece was egregious misconduct but did not merit dismissal of charges because it did not interfere with defendant's right to testify).

14(b)(2)(C)(v)(c)

*[This is a new section.]*

Because the prosecution must establish the authenticity of any evidence it may introduce, as well as the reliability and validity of any expert testimony it may offer, information that

tends to call into question these prerequisites is favorable to the defense. Naturally information showing systemic deficiencies in the collection, analysis, or preservation of a type or category of evidence to be offered at trial is favorable to the defense. *CPCS v. AG*, 480 Mass. at 725-729 (Information that state drug laboratory chemist had tampered with samples that she tested, as well as those tested by other chemists, prevented retesting of the original substances, called into question the accuracy of all the laboratory's drug analysis certificates, and diminished the reliability and integrity of all testing conducted during the chemist's tenure at the laboratory.). See also *Commonwealth v. Francis*, 474 Mass. 816, 826 (2016) (State health laboratory chemist's deliberate falsification of multiple drug test results through "dry-labbing," intentionally contaminating samples, removing samples from evidence locker in violation of lab protocols, postdating entries in evidence logbook, forging evidence officer's initials, and falsifying reports on verification tests for machines used to run confirmatory tests were material exculpatory evidence in any case in which she was the primary or secondary analyst); *Scott*, 467 Mass. at 351-353 & n.9 (Information from investigation of state drug laboratory chemist's mishandling of and tampering with drug samples and falsely claiming to hold graduate degree provided sufficient basis to presume all tests in which she was the primary or confirmatory chemist lacked integrity even if the chemist were to testify she had not mishandled or tampered with a specific sample).

Such deficiencies can come from equipment or technologies as well as human causes. *Neal*, 392 Mass. at 14 n.12 ("[I]nformation available to the Commonwealth from a manufacturer of [alcohol] breathalyzer equipment or other sources that specific lots of test or reference ampules may be defective, or that the accuracy of breathalyzer results may be otherwise impaired [through radio frequency interference] . . . is Brady material."). In these instances of systemic deficiency, the authenticity of evidence offered in a case is affected by actions in factually unrelated cases or investigations, just as it is when information shows that a witness the prosecutor may call has admitted to making false statements in unrelated matters. *Matter of a Grand Jury Investigation*, 485 Mass. at 649, 658 (Immunized grand jury testimony from police officers admitting falsification of use-of-force reports to protect a fellow officer who used excessive force was exculpatory and had to be revealed to defendants in unrelated cases in which the testifying officers were potential witnesses or had prepared reports).

Even without systemic deficiencies, information that shows the original version or copy of evidence has been lost or destroyed may be favorable to the defense. *Neal*, 392 Mass. at 11- 12; *Harwood*, 432 Mass. at 295-298 (Destruction of original letter to insurer attesting to defendant's employment deprived defendant of exculpatory evidence in worker's compensation fraud case because it precluded more reliable handwriting analysis than

was possible on copies of the letter.). Information that could reduce the probative value of evidence the prosecutor anticipates introducing by putting it into context must be disclosed. Baran, 74 Mass. App. Ct. at 298 (When compared to edited videotaped interviews of suspected child abuse victims provided in discovery, unedited videotaped interviews “evaluated in the context of the entire record, are exculpatory and material insofar as they create a reasonable doubt that did not otherwise exist.”). (Internal quotes omitted.)

Items or information that could affect the reliability or validity of any expert testimony the prosecution may introduce is also favorable to the defense. Such items or information could apply to the specific expert at issue, the expert’s methods or processes, or both. Neal, supra, 392 Mass. at 14 (Information could affect reliability of all expert testimony based on tests using particular brand of breathalyzers located in a position in which they could be subject to radio frequency interference); Hernandez, 481 Mass. at 195 (Failed proficiency tests by state police crime lab chemist who acted as crime scene supervisor were exculpatory and should have been disclosed); Sullivan, 478 Mass. at 381-382 (State police crime lab chemist’s failed proficiency tests were exculpatory because they could have suggested he misled the jury concerning his qualifications).

14(b)(2)(C)(v)(d)

*[This is a new section.]*

The exercise of selectivity in law enforcement cannot be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” Oyer v. Boles, 368 U.S. 448, 456 (1962); Commonwealth v. King, 374 Mass. 5, 20 (1977) (police or prosecutorial policy of selectively enforcing prostitution law against females rather than males violates equal protection guarantees of federal and Massachusetts constitutions). Thus items or information that could support a motion to dismiss for selective prosecution or to suppress or exclude evidence obtained through selective enforcement is favorable to the defense. Commonwealth v. Lora, 451 Mass. 425, 439 (2008) (“application of the exclusionary rule to evidence obtained in violation of . . . equal protection . . . is entirely consistent with the policy underlying the exclusionary rule, is properly gauged to deter intentional unconstitutional behavior, and furthers the protections guaranteed by the Massachusetts Declaration of Rights”).

In cases involving vehicle or pedestrian stops, for example, information that in any way suggests race or other prohibited classifications played a role, even in part, in the stop or the decision to stop is favorable to the defense. Commonwealth v. Long, 485 Mass. 711, 739 (2020) (“[A] traffic stop motivated by race is unconstitutional, even if the officer also was motivated by the legitimate purpose of enforcing the traffic laws.”); Commonwealth v.



Robinson-Van Rader, 492 Mass. 1, 18 (2023) (same standard applies to allegedly discriminatory pedestrian stops). Because constitutionally impermissible motivation may be implicit as well as explicit, information or materials that could suggest unconscious bias had any role in the stop or the decision to stop are favorable to the defense. *Id.* at 747 (citing *Commonwealth v. McCowen*, 485 Mass. 461, 499 (2010) (Ireland, J. concurring) (“people possess [implicit racial biases] over which they have little or no conscious, intentional control”)). See also *Commonwealth v. Buckley*, 478 Mass. 861, 878 and n.4 (2018) (Budd, J., concurring). This information must be disclosed whether it relates to the specific personnel involved, the agency or department, or both. *Long*, 485 Mass. at 739-740 & nn.7-12.

### **14(b)(3) Statement definitions**

[This is a new section. Prior Rule 14(d)(1) and 14(d)(2) are now renumbered as Rule 14(b)(3)(A) and 14(b)(3)(B).]

This section defines two types of statements used in Rule 14, “written statements” and “oral statements.” These definitions control the scope of automatic discovery of investigative materials and items and information favorable to the defense. See Rules 14(b)(1) and 14(b)(2). (These definitions also apply to the term “written statement” as used in Reciprocal Discovery from the Defense. Rule 14.1(a)).

#### **14(b)(3)(A)**

*[This is a new section. Prior Rule 14(d)(1) and 14(d)(2) are now renumbered as Rule 14(b)(3)(A) and 14(b)(3)(B).]*

As under the prior rule, written statements of prosecution witnesses are subject to automatic discovery. What had been previously called a “statement” is now called a “written statement” but its definition is unchanged. Prosecution witness statements subject to automatic discovery as investigative materials are limited to those made, signed, or adopted by the witness, or which have been recorded through any means that provides a substantially verbatim recital of an oral declaration, excluding as before real time translations or their functional equivalents made to assist a deaf or hearing-impaired person that is not transcribed or permanently saved in electronic form. Rules 14(b)(3)(A)(i) and 14(b)(3)(A)(ii). Drafts or notes of such statements that have been incorporated into later drafts or a final report are excluded from this definition.

#### **Rule 14(b)(3)(A)(i)**

The only addition to investigative materials subject to automatic discovery is that oral statements made in the presence of or by an identifying witness that are relevant to the

issue of identity or to the fairness or accuracy of the identification procedure are also included. Rule 14(b)(1)(I).

#### **14(b)(3)(B)**

The term “oral statement,” as used in this rule, means any communication, by speech or nonverbal conduct intended as an assertion, of a person having percipient knowledge of relevant facts and which contains such facts that is not a written statement.

The rule now defines the term “oral statement” for automatic discovery of the expanded category of items and information favorable to the defense in Rule 14(b)(2). An oral statement is any communication by a witness by speech or nonverbal conduct intended as an assertion that is not a written statement. Rule 14(b)(3)(B). Any communication in any form by a witness the prosecutor may call that is favorable to the defense must be disclosed, even if it is unwritten and unrecorded. These “oral statements” include casual, offhand, or informal remarks, as well as gestures or other nonverbal conduct intended as assertions, such as nodding, shaking one’s head, or pointing. For example, passing remarks, whether in person or through telephonic or electronic communication before or after the witness makes a written statement that qualify, limit, or temper the witness’s written statement must be disclosed.

Items and information favorable to the defense specifically include both oral statements and written statements of a person the prosecutor may call that are at all inconsistent with any prior statements of the person known to the prosecutor or with any statements of any other witness the prosecutor may call. Rules 14(b)(2)(C)(i)(d) and 14(b)(2)(C)(i)(e). Similarly, both oral statements and written statements of any percipient witness, without regard to whether the prosecutor may call the witness, that are either inconsistent with the witness’s own oral or written statements or with any other witness’s oral or written statements about the alleged incident or the defendant’s conduct, are favorable to the defense and must be disclosed. Rules 14(b)(2)(C)(ii)(b) and 14(b)(2)(C)(ii)(c). Finally, any oral statements or written statements known to the prosecutor that were made by any person the prosecutor does not anticipate calling that are inconsistent with any oral or written statements of any witness the prosecutor may call must be disclosed. Rule 14(b)(2)(C)(iv)(a). In short, any statements in any form by any person that are at all inconsistent with any statements of someone who may be a prosecution witness must be disclosed.

#### **14(b)(3)(C)**

*[This is a new section.]*

The broader range of items and information subject to automatic discovery as items and information favorable to the defense that includes both oral and written statements means

that automatic discovery may be required of information as both investigative material and items and information favorable to the defense. For example, if a witness the prosecutor may call gives a recorded interview to a member of the prosecution team, that interview is a “written statement” subject to automatic discovery as investigative materials. If the witness later mentions something in passing to a member of the prosecution team that is inconsistent with their written statement, whether adding, varying, or supplementing the written statement, even by making it more incriminating, that passing remark must be disclosed as material favorable to the defense. Rule 14(b)(3)(C). The “entirety of the substance of the information must be fully and completely disclosed” notwithstanding any part of it having been previously disclosed.

The disclosure of unwritten oral statements should be memorialized as soon as there is a reasonable opportunity, manner, and means to do so. For example, the prosecutor could memorialize by electronic communication the disclosure of a passing remark or offhand comment by a witness that is inconsistent with other statements the witness was made.

## Section 14(c). Timing of Discovery

*[This is a new section.]*

Unless otherwise ordered by the court, automatic discovery from the prosecution is subject to two deadlines. First, at arraignment the prosecutor must provide all items and information subject to disclosure under Rule 14(b) that are then in the prosecutor’s possession. Some materials subject to disclosure are routinely available to the prosecutor at arraignment, such as statements of the defendant and police reports, and delaying provision of these unnecessarily slows preparation of the defense case. Second, by the first pretrial conference the prosecutor shall provide all items and information required to be disclosed by Rule 14(b) that are then available to the prosecution team. While gathering materials from the prosecution team may require additional time, especially in complex cases, the first pretrial conference is the point by which the prosecutor should be able to complete automatic discovery of all investigative materials and items and information favorable to the defense. The prosecutor must promptly file a certificate of compliance certifying completion of discovery and listing each item provided. See Rule 14.2(e).

## Section 14(d). Continuing duty

*[This is section replaces prior Rule 14(a)(4) but makes no substantive change.]*

The prosecutor’s disclosure duties are continuing duties. Rule 14(d) provides that the prosecutor’s later possession of information or items subject to disclosure requires prompt action. The prosecutor must disclose the item or notify the defendant of the information in the same way as would have been required initially and the prosecutor must file a

supplemental certificate of compliance. Rule 14.2(e); *Commonwealth v. Bryant*, 390 Mass. 729, 747 (1984) (“The attorney’s duty does not stop with the first compliance with a defendant’s request for disclosure. Changes of substance damaging to the defense must be reported to opposing counsel.”).

As a matter of due process and the right to a fair trial, the continuing disclosure duty also imposes an obligation on the prosecutor to correct statements made in discovery that the prosecutor subsequently learns are incorrect. *Id.* at 747 n.26. See also *Vaughn*, 32 Mass. App. Ct. at 440-441 (Failure to disclose Commonwealth witness’s intended change of testimony to something more incriminating violated continuing duty because the discrepancy in the testimony was exculpatory). The same continuing duty applies equally to the defendant under Rule 14.1(b).

### *(2015-Rule 14(b)(2)(C))*

## **Rule 14(b)(2)(C) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B)**

In *Commonwealth v. Hanright*, 465 Mass. 639, 648 (2013), the Supreme Judicial Court held that, when a judge orders a defendant under Rule 14(b)(2)(B) to submit to a forensic mental evaluation, the judge may also require the defendant to disclose to the court-appointed examiner (“Commonwealth’s examiner” or “examiner”) treatment records necessary to conduct that forensic evaluation. Rule 14(b)(2)(C) sets out the scope and sequence of that disclosure and the procedure by which it is implemented. Under the rule, both experts—the Commonwealth’s examiner and the defendant’s expert—must be given equal access to the information they collectively deem necessary to conduct an effective forensic examination and produce a competent report. The rule achieves this result, without involving the prosecutor, through a reciprocal discovery process that makes available to each expert (1) the defendant’s pertinent medical and mental-health records and (2) the raw data from tests or assessments of the defendant administered during the course of the experts’ respective examinations of the defendant. By ensuring that the experts are working from a common, comprehensive set of records and objective, test-generated data, the rule advances the reliability and fairness of the examinations and the ensuing reports, and it promotes efficiency in the examination process.

### ***Rule 14(b)(2)(C)(i)***

Rule 14(b)(2)(C)(i) outlines the defendant’s disclosure obligation. The rule requires that the defendant make available to the Commonwealth’s examiner, within 14 days of the examiner’s appointment, three categories of information: (a) the defendant’s mental-health records, broadly defined, that are possessed by defense counsel, (b) the

defendant's medical records that are possessed by defense counsel, and (c) the raw data from any tests or assessments administered to the defendant in the course of the defense expert's examination of the defendant. This discovery obligation is intended to provide equal and full access for both parties to the defendant's pertinent mental-health and medical history at the time each expert is conducting his or her examination of the defendant. Full discovery of pertinent source material at this point, when the examiners are forming their respective opinions concerning the defendant's mental health without yet having access to the opinions of the other, promotes the truth-seeking function of the trial, see *Hanright*, 465 Mass. at 644-645, while making the examination process more efficient.

In defining the scope of the mental-health and medical records to be produced as those possessed by defense counsel, the rule intends as wide a reach as is reasonably possible, covering every such record that the defense collected in the course of considering whether to assert this defense. At this point in the process, the defendant has waived any privilege that might preclude producing his statements and records to the Commonwealth's examiner, see *Hanright*, 465 Mass. 2 at 645-648, and the rule means to give both experts access to every record reasonably available, relying on the experts independently to decide which records are relevant to the inquiry. If, in examining the defendant and the records that the defendant produced, the Commonwealth's examiner identifies a mental-health or medical record that the defense overlooked, or chose not to collect, and thus did not produce, Rule 14(b)(2)(C)(iii), discussed below, provides for a process by which the examiner can seek that record. Any such records would, under the rule, be available to both experts.

The raw testing data that Rule 14(b)(2)(C)(i) requires the defendant to produce consists of objective, uninterpreted test results, for example, multiple-choice, bubble outputs from a psychological test with quantification on various scales. As discussed below, Rule 14(b)(2)(C)(iv) requires the same disclosure from the Commonwealth's examiner. The intent is to provide both experts with all of the relevant, objective testing data available at the time each writes his or her report, thus avoiding the need for supplemental reports or evaluations that consider pertinent testing data first revealed in the other expert's report. Not only would the necessity of such supplemental reports or evaluations extend the examination process, but these reports would necessarily be written after reviewing the opposing expert's report, thus putting in question the independence of this supplemental evaluation of these testing data. The rule's discovery obligation reaches only raw testing data; it does not apply to the defense expert's work product, such as notes interpreting this raw testing data or notes relating to a clinical interview of the defendant. This mandatory disclosure of raw testing data generated by the experts during the course of their respective examinations works no unfair advantage to either side. The discovery obligation is mutual.

As with defendant's mental-health and medical records, the raw data resulting from tests administered to the defendant are essential to determining the defendant's mental-health at the time in question, and all of these data must be considered by both examiners if their respective reports are to serve their truth-seeking function. Finally, the test results will ultimately be released with the final reports under Rule 14(b)(2)(B)(iii); the only question Rule 14(b)(2)(C)(i) & (iv) address is the timing of that release.

### ***Rule 14(b)(2)(C)(ii)***

As noted, Rule 14(b)(2)(C)(i) requires the defendant to produce the mental-health and medical records and raw testing data within 14 days after the judge appoints the Commonwealth examiner. Under Rule 14(b)(2)(C)(ii), the defendant's duty to disclose records and raw testing data continues throughout the examination period provided under Rule 14(b)(2)(B). If the defendant discovers records or raw testing data that was subject to production under Rule 14(b)(2)(C)(i) but was not produced, those records or data must be produced as soon as they are discovered. Moreover, if subsequent to the initial production under Rule 14(b)(2)(C)(i) defense counsel obtains records covered by the rule or the defense expert generates test data covered by the rule, Rule 14(b)(2)(C)(ii) requires that these materials be promptly produced to the Commonwealth's examiner.

### ***Rule 14(b)(2)(C)(iii)***

As noted, this subsection anticipates the possibility that the Commonwealth's examiner will learn of additional medical or mental-health records that he or she believes necessary to conducting a professionally competent examination. For example, a record provided by the defendant, or a comment by the defendant during the court-ordered examination, might refer to an earlier hospitalization of the defendant for which the defendant did not produce records. If the examiner concludes that there is a reasonable possibility that such records exist and should be reviewed, Rule 14(b)(2)(C)(iii) provides for a procedure by which the examiner can file with the court a prescribed form under seal identifying the requested records (with as much specificity as circumstances reasonably permit) and stating the reason(s) for the request. Because at this point the court has yet to find sufficient evidence of privilege waiver by the defendant to permit the prosecutor's involvement in the examination process, see Rule 14(b)(2)(B)(iii), under Rule 14(b)(2)(C)(iii), the examiner may not inform the prosecutor of the document request or its contents, absent permission from either the defense or the court.

Upon receiving the sealed request, the court must issue a copy to the defendant, notifying the Commonwealth only that a sealed request for additional records has been filed. The defendant has 30 days to file ex parte a written objection to the requested production. If the defendant timely files such an objection, the judge has the discretion to hold an ex parte

hearing on it, including, again in the judge's discretion, permitting the Commonwealth's examiner to participate. If the judge grants any part of the examiner's request, the judge must inform the clerk to which records the examiner may have access, and the clerk must then subpoena those records. When the records arrive at the clerk's office, the clerk must notify the examiner and the defendant of the records' availability for examination and copying, subject to a protective order forbidding their disclosure to the prosecutor unless the judge determines that the conditions set forth in Rule 14(b)(2)(B)(iii) for permitting prosecutorial access to the examiners' reports are met. The clerk's office must maintain the records under seal.

When the report of the Commonwealth's examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), the records related to the examiner's Rule 14(b)(2)(C)(iii) request for additional records shall also be released to the parties, subject to the judge's narrow discretion to forbid such release. At this point in the process, the defendant has effectively waived any claim of privilege concerning evidence relating to the mental-health defense. See Hanright, 465 Mass. at 645-647. The only reason for withholding from the prosecutor information concerning the examiner's request for additional records would presumably be a concern that information there set forth would have little or no relevance to the mental-health defense and would cause unfair prejudice to the defendant in conducting the mental-health defense, a balancing of interests with which judges are quite familiar. As is so with the release of the examiners' reports and supporting records, the release of records relating to a request for additional records would be confined to the parties; these records would remain sealed to the public. Granting the prosecutor access to the records relating to a denial of an examiner's request for records would not only 4 permit full communication between the prosecutor and the examiner in preparing for trial, but it would also allow the Commonwealth to weigh the possibility, however remote, of seeking appellate review of the denial.

#### ***Rule 14(b)(2)(C)(iv)***

As noted above, once the Commonwealth's examiner completes his or her examination of the defendant, the examiner must disclose to the defendant all raw data from any tests or assessments that the examiner conducted or requested. This ensures full reciprocity between the parties. Presumably, the only mental-health or medical records available to the examiner would be those provided by the defendant or produced in response to a court order under Rule 14(b)(2)(C)(iii), making any reciprocal discovery of such records unnecessary. The production of raw testing data by the court-ordered examiner would result in both experts having full access to the same records and raw testing data before they complete and file their respective reports.

(2012)

In 2012, Rule 14 was amended in several respects. These revisions are discussed below.

### Subdivision (b)(2). Mental health issues.

This amendment responds to the Supreme Judicial Court's expansion of the Blaisdell procedure to analogous situations such as defenses based on an inability to form the requisite intent for an element of the crime, see *Commonwealth v. Dias*, 431 Mass. 822, 829 (2000), on an inability to premeditate, see *Commonwealth v. Contos*, 435 Mass. 19, 24 n.7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive Miranda rights, see *Commonwealth v. Ostrander*, 441 Mass. 344, 352 (2004). In addition, the Court has indicated in dicta that the same would hold true in the case of a defense based on battered woman syndrome, see *Ostrander*, 441 Mass. at 355 (2004).

There are two different dimensions to the problem that this subsection addresses. One concerns giving notice to the Commonwealth of a complex issue that the prosecutor otherwise would have no reason to expect to litigate. The other deals with redressing the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert.

The amendment addresses the first concern by expanding the scope of the notice provision beyond the context of Blaisdell to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. As used in this subsection, the term "mental health defense" does not include a claim that the defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The amendment addresses the second concern by requiring notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it related to culpability, competency or because it concerns the admission of evidence. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession was not voluntary, as in *Ostrander*, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession. If it appears that the expert will rely on



statements of the defendant as to his or her mental condition, then the judge may order the defendant to submit to an examination pursuant to subsection 14(b)(2)(B).

***Subdivision (b)(2)(B)(i)***

The amendment deletes “physiological tests” from those that may be included in a court-ordered examination. This deletion is not intended to work any substantive change to the rule but rather to eliminate a superfluous term. Under the rule, “physical tests” is meant to include “physiological tests,” including but not limited to neurological tests and examinations such as magnetic resonance imaging (MRI) and positron emission tomography (PET) scans.

***Subdivision (b)(2)(B)(iii)***

The Rule applies not only to experts who are psychiatrists, but to psychologists as well.

The regime for disclosure of expert reports has been amended in light of *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300 (2010). The timing of the release of the Commonwealth’s expert’s report was altered only to make clear that the parties can agree on its disclosure at a time earlier than previously set out in the Rule. See *Sliech-Brodeur*, 457 Mass. at 325 n.34 (2010). As required by *Sliech-Brodeur*, defense experts as well as the prosecution’s must prepare and disclose reports. In order to avoid infringing on the defendant’s privilege against self incrimination, the defense expert’s report is released to the prosecution at the same time that the defendant receives the report of the Commonwealth’s expert. The Rule also has been amended to address the timing of the exchange of reports. The latest date of exchange would be when the defendant expresses a “clear intent” to rely on mental impairment as an issue in the case, relying in part on the defendant’s statements or testimony. This will often occur at the final pretrial conference or comparable event. The Rule attempts to avoid the delay and inconvenience of disclosing the reports only after the defendant’s expert offers testimony on direct examination. Finally, the rule as amended makes clear the judge’s discretion to review any expert report filed with and sealed by the court, and, if feasible and appropriate, to release to the parties any unprivileged material contained in the report prior to the report’s full disclosure to the parties.

Once the reports have been released to the parties, they may be shared with the respective experts for each side.

The Rule has been amended to require more detail in the content of the report that both prosecution and defense experts must file. This portion of the Rule is patterned after 18 U.S.C.S. § 4247(c). In one major respect, however, the Rule goes beyond the federal model by requiring the report to contain a complete account of the statements of the defendant that are relevant to the issue of his or her mental condition. This includes both statements

relating to the underlying incident as well as any statements prior to or following it that are relevant to the defendant's mental condition. If the examiner considered written statements of the defendant, the report should contain the relevant portions. If the examiner considered oral statements of the defendant, the report should include the substance of what the defendant said that bears on the question of his or her mental condition. In reporting on the defendant's statements, examiners should not withhold relevant evidence contrary to their own position.

The protection of the work product doctrine and the principle that notes or preliminary drafts are not discoverable if they are incorporated into a final report, applicable elsewhere in the discovery regime that Rule 14 establishes, apply as well in this context.

### ***Subdivision (b)(2)(C)***

This provision gives trial judges the flexibility to require the parties to provide additional discovery beyond the information contained in the notice that the defendant must give and the reports that the experts must file. It is a very limited grant of discretion and should be reserved for cases presenting discovery issues that are out of the ordinary. In this respect, it is more restrictive than the analogous discovery provision in Rule 14(a)(2).

### **Subdivision (b)(4). Self Defense and First Aggressor.**

This amendment implements the discovery obligation created by *Commonwealth v. Adjutant*, 443 Mass. 649 (2005). The procedure it mandates applies only to situations such as those in *Adjutant*, where the defendant intends to rely on self defense claiming that the victim was the first aggressor. The notice procedure established in this amendment does not apply to other instances where prior violent conduct by the victim may be admissible, such as where the defendant intends to introduce evidence of a violent act by the victim of which he or she was aware at the time of the incident that is the subject of the criminal case before the court. See *Commonwealth v. Fontes*, 396 Mass. 733, 735-36 (1986). However, in a case where the defendant wishes to introduce evidence of an act of prior violence by the victim to support a claim based on both *Adjutant* and *Fontes*, the notice provision of this subsection would apply.

Beyond notice of an intent to raise the issue of prior violent acts by the alleged victim as it bears on the identity of the first aggressor, the amendment also requires the defendant to provide specific information about each incident. Where the defendant lacks specific details as to the time and place of a prior incident, the notice should contain as much information as is available, subject to a continuing duty to supplement the notice as counsel becomes aware of further facts.

The reciprocal obligation on the Commonwealth extends to all evidence that it intends to introduce to rebut the defendant's claim that the victim was the first aggressor. This may concern the victim's role in the incidents of prior violence upon which the defendant may rely, or any other evidence the Commonwealth may introduce in rebuttal.

Nothing in this amendment is intended to derogate from the discovery obligations of Rule 14(a)(1)(A)-(B) concerning physical evidence or documents that either party may rely on with respect to prior acts of violence by the victim.

This subsection does not affect the ultimate decision the judge must make on the admissibility of the evidence contained in the defendant's notice, or of any rebuttal evidence the prosecution might offer. The rule does contemplate, however, that failure to provide notice in advance may bar a party from offering evidence that might otherwise be admissible.

### Subdivision (d). Definition.

In 2012, Rule 23 was eliminated because the 2004 revision of Rule 14 largely made it irrelevant. Almost all of the statements that Rule 23 required a party to produce after a witness testified were made part of the automatic pretrial discovery mechanism of Rule 14. Because a small class of statements covered by Rule 23 was not included in the definition of a statement in the 2004 revision of Rule 14(d), an amendment to this subsection was made. The amendment brings within the confines of Rule 14 the remaining class of statements that were subject to the discovery provision of the former Rule 23.

Section 14(d)(1) was amended to include not only writings made by a witness, but also writings made by another and signed or otherwise adopted by the witness. A person otherwise adopts a statement when he or she approves it or accepts it as accurate. See, e.g., *Smith v. United States*, 31 F.3d 1294, 1301 (4th Cir. 1994) (“[n]otes taken by prosecutors and other government agents during a pretrial interview of a witness may qualify as a ‘statement’ . . . if the witness has reviewed them in their entirety—either by reading them himself or by having them read back to him—and formally and unambiguously approved them—either orally or in writing—as an accurate record of what he said during the interview.”)

Section 14(d)(2) was amended to remove the requirement that a witness's statement has been recorded contemporaneously. This is an issue that will only be relevant with respect to written accounts of what the witness said, since by their nature stenographic, mechanical, electrical or other means of recordings must be made contemporaneously. With respect to written accounts, Rule 14(d) includes substantially verbatim statements of a witness that are contained in a document written by someone else, whether the

document consists solely of the witness's statement or the witness's statements appear only in part of the document. In the latter case, only that portion of the document that consists of the substantially verbatim account of the witness's statement must be produced. This provision is intended only to require the production of statements that can "fairly be deemed to reflect fully and without distortion" what the witness said. See *Palermo v. United States*, 360 U.S. 343, 352-53 (1959); *United States v. Hodges*, 556 F.2d 366 (5th Cir. 1977) cert. den. 434 US 1016 (1978) (that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes discoverable).

### (2008)

The definition of a statement was revised in 2008 to exempt the means by which hearing impaired attorneys gain access to an electronic display of the words a witness utters. Whether through a computer assisted real time translation or other means, so long as the witness' words are not transcribed or saved in electronic form, as in a computer file, the fact that a contemporaneous transcript of the witness' words appears on a screen to assist a hearing impaired attorney does not fit the definition of a statement under the terms of Rule 14. This amendment does not affect any other aspect of an attorney's discovery obligations, such as the requirement that a prosecutor reveal exculpatory evidence.

### (2004)

This rule is based on the concept of reciprocity and has as its aim full pretrial disclosure of items normally within the range of discovery. It is emphasized, however, that this rule establishes a formal discovery procedure and is not intended to discourage those disclosures which may take place at a pretrial conference under Mass. R. Crim. P. 11 or whatever other informal discovery may be agreed upon by the parties. See *Commonwealth v. Delaney*, 11 Mass. App. Ct. 398 (1981).

The 2004 amendments. The substance of the original version promulgated in 1979 was drawn from Fed. R. Crim. P. 12.1, 12.2 and 16, N.J. R. Crim. P. 3:13-3 (1972), Fla. R. Crim P. 3.220 (1975), and the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1979). As more fully discussed *infra*, in 2004 the Rule was substantially revised to eliminate the requirement of pretrial motions in many routine areas of discovery, instead mandating that such discovery be (1) mandatory, and (2) provided automatically to both prosecution and defense. These automatic discovery obligations stem directly from the rule itself, but pursuant to subdivision (a)(1)(C) have all the force and effect of a court order. Discovery of items not included in the automatic discovery regime remains subject to the court's discretion, and may be requested by pretrial motion.

The decision to broaden the ambit of mandatory discovery reflects a conviction that full, automatic, and even-handed discovery to both sides will improve both the administration and delivery of justice. Comprehensive discovery affords counsel a full opportunity to prepare the case, rather than be hijacked by surprise evidence, as the Supreme Court has noted. See *Wardius v. Oregon*, 412 U.S. 470, 473-74 (1973) (“the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.”) It also brings Rule 14 in line with the broad discovery requirements that have existed in district court since the abolition of trial de novo in 1994 under G.L. c. 218, § 26A and District Court/BMC Rule 3(c). Finally, the decision to afford mandatory discovery to the prosecution as well as the defense assures that one party will not be disadvantaged by a comparative inability to prepare.

A second major innovation—mandating discovery without the need for motions or argument—is designed to manage court events more efficiently. In areas where discovery is routinely afforded in practice, requiring motions and hearings simply delayed the case and absorbed court and counsel time and expense. The revision recognizes that it is far more efficient to provide automatic discovery of such items to both sides, so long as all parties have a full opportunity to argue against discovery of any of these items where special circumstances in the case warrant divergence from these presumptive procedures. Moreover, automatic discovery early in the case provides the defense with notice of the Commonwealth’s case prior to plea negotiations or the filing of other pretrial motions. The grounds for such motions, and the advisability of a plea, may only be revealed through discovery.

The 2004 amendments made some additional, more minor changes to Rule 14. A revision to Rule 14(d) modified the definition of “statements” for purposes of this rule, as described below. Rule 14(e), which formerly specified the timing requirements for discovery motions, was deleted because revised Rule 13(d) now governs all pretrial motion deadlines, including discovery motions. The 2004 amendments did not make substantive changes to section (b), concerning notice of certain defenses to the prosecution, or section (c), concerning sanctions for non-disclosure.

## Subdivision (a)

Initially Rule 14(a) classified the items now included in sections (a)(1)(iv) through (ix) as “discretionary discovery,” to be ordered within the sound discretion of the trial judge. In 2004, however, subdivision (a) was substantially revised to require these items to be produced to the opposing party automatically. However, if a party believes good cause exists for non-discovery of an item listed as automatic discovery, it may resist disclosure

pursuant to Rule 14(a)(1)(C), providing for a mandatory stay of discovery of any item that the obligated party believes should not be disclosed, pending resolution by the court.

Subdivision (a)(1) of this rule details the parties' automatic discovery rights. 14(a)(1)(a) sets out the defendant's rights to certain mandatory discovery without motion, and (a)(1)(b) provides reciprocal automatic discovery rights to the prosecution. To a very large extent, the scope of disclosure called for by this subdivision is a codification of prior Massachusetts practice.

***(a)(1)(A). Mandatory Discovery for the Defendant.***

This provision lists the items that the prosecution must produce for discovery, with the qualification that the prosecutor's automatic discovery obligation is confined to ascertaining and delivering relevant material it and/or its agents already possess or control. The first paragraph of this subsection limits the Commonwealth's discovery obligation to material "in the possession, custody or control of the prosecutor, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case..." This language, inserted in 2004, is not intended to change existing case law but to reflect it. The language is specifically drawn from *Commonwealth v. Daye*, 411 Mass. 719, 734 (1992) (also stating that a prosecutor "cannot be said to suppress that which is not in his possession or subject to his control"). *Daye* and many cases since describe the prosecution's duty of disclosure as extending to all discoverable material existing in its own files and in the files of others who have participated with them in the prosecution. The latter officials are usually police, but may include others assisting in the prosecution. Thus in *Commonwealth v. Martin*, 427 Mass. 816, 823-24 (1998), the S.J.C. reversed a conviction because the prosecutor failed to turn over evidence he did not know existed, but which was known to the Commonwealth's crime lab, because "the prosecution had a duty to inquire" concerning the existence of such tests. *Id.* at 823. See also *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 135 (2001) (victim witness advocates are part of prosecution team and are subject to the same discovery rules); *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 n. 4 (1987). It is also clear, however, that the scope of the prosecutor's duty of disclosure does not extend to complainants and independent witnesses who are not agents of the prosecution with regard to some aspect of the case. *Commonwealth v. Lampron*, 441 Mass. 265, 269 n. 4 (2004) (records of medical and social service providers, including D.S.S.); *Commonwealth v. Beal*, 429 Mass. 530 (1999) (complainant); *Commonwealth v. Wanis*, 426 Mass. 639 (1998) (Rule 14 does not reach Internal Affairs Division records because the IAD is not part of the prosecution team).

Under (a)(1)(A), each of the following items must be produced for the defense at or before the pretrial conference, provided it exists and is (1) relevant to the case, (2) within the possession or control of the prosecution or its agents as just defined, and (3) not the subject of a motion for a protective order, which stays its production under subdivision (a)(1)(C)). Even before the 2004 revision, the prosecution was required to turn over most of these items in District Court and the Boston Municipal Court pursuant to Dist./Mun. Ct. Rule 3 and M.G.L. c. 218, sec. 26A, which eliminated trial de novo and mandated broad discovery to the defense.

**(a)(1)(A)(i). Statements of the defendant(s).**

Rule 14 previously included the written or recorded statements of the defendant and any co-defendants in its category of mandatory discovery which must be disclosed. The 2004 revision includes these items as automatic discovery, and adds “the substance of any oral statements” of the defendant or co-defendants. This addition reflects the broader discovery requirement established by case law. The substance of the defendant’s oral statements must be provided “as a matter of course to counsel for the defendant” according to *Commonwealth v. Lewinski*, 367 Mass. 889, 903 (1975). See also *Commonwealth v. Gilbert*, 377 Mass. 887, 892-94 (1979); *Commonwealth v. Lopes*, 25 Mass. App. Ct. 988 (1988); *Commonwealth v. Lapka*, 13 Mass. App. Ct. 24, 31 (1982); *Commonwealth v. Janard*, 16 Mass. App. Ct. 931, 933 (1983).

**(a)(1)(A)(ii). Grand jury minutes and statements of grand jury witnesses.**

The rule had developed in both the Massachusetts and federal courts that pretrial discovery of grand jury minutes was to be allowed when the defendant showed a “particularized need” that the release of a part or all of the minutes would serve. *Dennis v. United States*, 384 U.S. 855 (1966); *Commonwealth v. Cook*, 351 Mass. 231 (1966), cert denied, 385 U.S. 981. The Supreme Judicial Court in *Commonwealth v. Stewart*, 365 Mass. 99 (1974), announced a new rule mandating that the court routinely order discovery of “the grand jury testimony of any person called as a Commonwealth witness which is related to the subject matter of his testimony at trial. The defense will not be required to show ‘particularized need.’” *Id.* at 105-06.

Superior Court Rule 63 (1974) mandates that stenographic notes of all testimony given before a grand jury shall be taken, but that transcripts thereof need be furnished only as required by the prosecuting officer unless the court orders otherwise. It is within the judge’s discretion under this subdivision to order the transcription of a stenographic record. Compare *Commonwealth v. Pimental*, 5 Mass. App. Ct. 463 (1977) (no error in ordering trial to proceed despite Commonwealth’s failure to comply with order to supply defendant with copy of grand jury minutes where minutes not transcribed).

Commonwealth v. Stewart, *supra*, required production of the grand jury testimony of “any person called as a Commonwealth witness.” 365 Mass. 106. However, since 1979 Rule 14 has required the pretrial production of the relevant “written or recorded statements of a person who has testified before a grand jury,” whether or not the Commonwealth intends to call that person at trial. There is no requirement that the grand jury testimony have been given before the grand jury which returned the indictment against the defendant, Commonwealth v. Cavanaugh, 371 Mass. 46, 57-58 (1976), as long as that testimony is relevant to an issue at trial. See Commonwealth v. Barnett, 371 Mass. 87, 94 (1976). However, a 2004 amendment requires the prosecution to also provide automatic discovery of the minutes of the grand jury that brought the indictment in the case.

Although the relevant grand jury testimony must be routinely supplied by the Commonwealth, if the judge rules that the requested testimony is either not relevant or is to be the subject of a protective order, a motion for production under Mass. R. Crim. P. 23 must be made at the time the witness testifies on direct examination.

**(a)(1)(A)(iii). Exculpatory evidence.**

This provision requires the prosecution to provide automatic discovery of “any facts of an exculpatory nature.” It derives from the constitutional requirement established in *Brady v. Maryland*, 373 U.S. 83 (1963), that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. Accord, *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois*, 408 U.S. 786, 794 (1972); *Commonwealth v. Adrey*, 376 Mass. 747, 753 (1978); *Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978). This duty is also an ethical one, imposed on the prosecution by S.J.C. Rule 3:07, R. P.C. 3.8(d).

The term “exculpatory” is not intended to be technically construed as encompassing alibi or other complete proof of innocence. Rather, case law at present defines exculpatory evidence to include (but not necessarily be limited to) all information that is material and favorable to the accused because it tends to cast doubt on defendant’s guilt as to any essential element of the crime charged, including the degree of the crime; or tends to cast doubt on the credibility of a Commonwealth witness, or on the accuracy of scientific evidence, that the government anticipates offering in its case-in-chief. In *Commonwealth v. Ellison*, 376 Mass. 1, 22 n. 9 (1978), the S.J.C. interpreted the *Brady* obligation as encompassing “evidence which provides some significant aid to the defendant’s case, whether it furnishes corroboration of the defendants version of facts, calls into question a material, although not indispensable, element of the prosecution’s version of the events, or challenges the credibility of a key Commonwealth witness.” See also *United States v.*



Bagley, 473 U.S. 667, 676-77 (1985) (impeachment material); Commonwealth v. Hill, 432 Mass. 704 (2000); Commonwealth v. Tucceri, 412 Mass. 401, 414 (1992); Blumenson, Fisher and Kanstroom, Massachusetts Criminal Practice, Sec. 16.6 (1998) (defining exculpatory evidence and the legal consequences of non-disclosure). The S.J.C. has advised that even minor prior inconsistent statements are exculpatory in the case of an important witness, and urged prosecuting attorneys to “become accustomed to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it.” Commonwealth v. St. Germain, 381 Mass. 256, 262 n. 10 (1980).

To establish a violation of the rule of Brady v. Maryland, supra, as incorporated herein, the defendant must demonstrate upon review that evidence actually existed, Commonwealth v. Adams, 374 Mass. 722, 732-33 (1978); that evidence would have tended to exculpate him, Commonwealth v. Pisa, 372 Mass. 590, 595 (1977), cert denied, 434 U.S. 869 (1977); and that the Commonwealth failed to disclose it upon proper request, Commonwealth v. Gilday, 367 Mass. 474, 487 (1975). Accord, Commonwealth v. Adrey, 376 Mass. 747 (1978).

Evidence in possession of the police is Brady material even if the prosecutor is unaware of it, so the prosecutor has a constitutional duty of inquiry. Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998); Commonwealth v. Baldwin, 385 Mass. 165, 177 n. 12 (1982); Kyles v. Whitley, 514 U.S. 419 (1995). However, there is no duty to search for exculpatory evidence outside the Commonwealth’s possession.

Commonwealth v. Martinez, 437 Mass. 84 (2002); Arizona v. Youngblood, 488 U.S. 51 (1988) (police do not have a constitutional duty to perform any particular tests). Evidence in government hands but not within the possession, custody or control of the prosecution team presents a special problem. In Commonwealth v. Wanis, 426 Mass. 639 (1998), the Supreme Judicial Court found that particular evidence in the files of the Internal Affairs Division of the police could be exculpatory evidence to which the defendant was constitutionally entitled, but because the I.A.D. was not a part of the prosecution team it could not be reached by the discovery mechanisms of Rule 14. The proper mechanism in such cases is a subpoena. Id. at 644; Commonwealth v. Lampron, 441 Mass. 265, 269 n. 4 (2004) (records of medical and social service providers, including D.S.S.).

Although exculpatory evidence is included within automatic discovery, if the defense is aware of items that may be exculpatory that have not been delivered by the pretrial conference, it should file a discovery motion specifying that evidence under subdivision (a)(2), as the magnitude of the error in non-disclosure is in part a function of the specificity of the motion. Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Gallarelli, 399 Mass. 17, 21 n.5 (1987). In addition to preserving the issue for appeal,

specificity can operate to avoid appeals by directing the attention of the prosecutor to those particular materials which the defendant believes would be helpful. A prosecutor cannot be expected to appreciate the significance of every item of evidence in his possession to any possible defense which the defendant may assert. *Commonwealth v. Pisa*, 372 Mass. 590, 595 (1977), cert denied, 434 U.S. 869 (1977). Assembly and disclosure of those materials—and thus the entire pretrial phase of the proceedings—is expedited by specific motions in such cases.

**(a)(1)(A)(iv). Names, addresses, and dates of birth of the Commonwealth’s prospective non-law enforcement witnesses.**

Names, addresses, and the criminal records of prospective witnesses were originally denominated discretionary discovery in Rule 14(a). However, some case law emerging around the time of the Rule’s promulgation mandated such discovery. *Commonwealth v. Adams*, 374 Mass. 722, 732 (1978); *Commonwealth v. Clark*, 363 Mass. 467, 474 (1973); *Commonwealth v. Ferrara*, 368 Mass. 182 (1975) (confrontation right to juvenile records which indicate bias despite confidentiality of juvenile records). But see *Halner v. Commonwealth*, 378 Mass. 388, 390 (1979). Legislation since makes defense discovery of names and addresses of Commonwealth witnesses a matter of right in district courts, and also requires the court to order the Probation Department to produce the prior criminal record of these witnesses. G.L. c. 218, § 26A.

Therefore, in 2004 Rule 14 was amended to include this provision, which requires automatic discovery of the names, addresses, and birthdates (which are necessary to locate a witness’ criminal record) of prospective witnesses other than law enforcement witnesses, which are covered by subdivision (a)(1)(v). It also requires the Commonwealth to provide this information to the Probation Department. A separate provision in this Rule, (a)(1)(D), requires the court to order the Probation Department to furnish the parties with the criminal record of all defendants and Commonwealth witnesses within five days of the Commonwealth’s notification to the department of its prospective witnesses.

In some cases, there may be special circumstances warranting non-disclosure of a witness’ address. For example, if a witness may be threatened or endangered by a defendant, disclosure should not be compelled. See e.g., *Commonwealth v. Rivera*, 424 Mass. 266, 269-72 (1997); *Commonwealth v. French*, 357 Mass. 356, 399 (1970). The identity of informants may be privileged against disclosure in some cases. *Commonwealth v. Abdelnour*, 11 Mass. App. Ct. 531. 538 (1981); *Roviaro v. United States*, 353 U.S. 53 (1957). There are several options available in such cases. Ordinarily the Commonwealth will move for a protective order under subdivision (a)(6), which stays automatic discovery of the contested item until the issue can be resolved by the court. If after a witness’ identity

and address have been disclosed, the court is advised that his safety is endangered, there is provision in Mass. R. Crim. P. 35 for the perpetuation of testimony. Once a witness' testimony is recorded, little reason remains for the defendant to attempt to intimidate him. Finally, subdivisions (a)(6) and (a)(7) provide specifically that the court can order information (including witnesses' names) to be disclosed only to defendant's counsel and not to the defendant himself. See also G.L. 258B, § 3(h), which allows a person to request non-disclosure of his or her address, telephone number, or place of employment or education, and if granted then prohibits disclosure of that information in open court.

If, after the initial phase of discovery, it is determined that additional witnesses will be called, the defendant may, in the discretion of the court, be granted time within which to investigate and interview that witness. See generally *Commonwealth v. Lopez*, 433 Mass. 406, 413-414 (2001); *Commonwealth v. Baldwin*, 385 Mass. 165, 176-77 (1982); *Commonwealth v. Mains*, 374 Mass. 733 (1978).

The Commonwealth's Probation Department records reveal with assurance only Massachusetts convictions; where known facts suggest that a witness has a record elsewhere, an inquiry as to out-of-state convictions may be a reasonable practice. *Commonwealth v. Corradino*, 368 Mass. 411, 422 (1975). See also *Commonwealth v. Donahue*, 396 Mass. 590, 599 (1986) (normally the state must produce the federal "rap sheet" of witnesses to the defendant).

**(a)(1)(A)(v). Names and business addresses of prospective law enforcement witnesses.**

In the first two decades of practice under Rule 14, it had become routine for the Commonwealth to provide the business address of a police witness when ordered to provide all prospective witness addresses. The 2004 amendment recognized this, and the fact that felons are statutorily barred from serving as police officers, by creating this subdivision that modifies the Commonwealth's obligation with regard to prospective witnesses who are law enforcement officers. In such cases the Commonwealth must provide automatic discovery of the name and business address of the witness. Further discovery concerning the witness, including home address and birthdate, may be pursued by motion under subdivision (a)(2). However, in the rare case where a prospective police witness has a criminal record which could be used for impeachment, the Commonwealth should provide automatic discovery of this fact under subdivision (a)(1)(A)(iii)(exculpatory evidence).

**(a)(1)(A)(vi). Intended expert opinion evidence.**

The Commonwealth's intended expert opinion evidence was made part of automatic, mandatory discovery to the defense under this 2004 provision. The subdivision specifies

that expert opinion evidence includes “the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.” Discovery of the prosecution’s expert opinion is also a matter of statutory right in district court. G.L. c. 218, § 26A.

Subdivision (vi) does not apply to experts who may have been interviewed or retained but whose testimony or reports are not intended for use at trial. It also does not apply to expert evidence relevant to a defendant’s criminal responsibility or to a mental impairment relevant to mens rea, which are governed by Rule 14(b)(2) as described *infra*.

Under the general automatic discovery provisions of subdivision (a)(1)(A), only evidence in the possession, custody or control of the prosecution at the time of the pretrial conference is due at that time. A party may discover or retain an expert later in the course of trial preparation, at which point it must provide discovery of its intended expert opinion evidence under the continuing duty requirement of subdivision (a)(4).

**(a)(1)(A)(vii). Material and relevant police reports, photographs, tangible objects, intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.**

Most of these items were treated as “discretionary discovery” in the original provisions of Rule 14. The 2004 amendments to Rule 14 make discovery of these items mandatory and automatic. However, in district court defense discovery of these items had been mandated since 1994 under M.G.L. c. 218, § 26A par. 2, which requires the prosecution to provide discovery of certain specified items and also “any material and relevant evidence [and] documents.” Because subdivision (vii) does not include the latter term but only specified items, the Commonwealth’s mandatory discovery obligation remains broader in district courts than in courts where sec. 26A does not apply. Nevertheless, the items included in this subdivision are likely to exhaust the Commonwealth’s evidence in many cases and therefore obviate the need for filing motions to obtain further discovery in those cases.

This provision encompasses “statements of persons,” but with regard to this item limits the scope of discovery to statements of only those persons whom the Commonwealth intends to call as witnesses at trial. Rule 14(d), described *infra*, defines the term “statement.” Mass. R. Crim. P. 23(b) affords an overlapping right to a testifying witness’ statements prior to cross examination. Similarly, subdivision (iii) requires that a witness’ prior inconsistent statement be provided to opposing counsel as exculpatory evidence, insofar as it would diminish the credibility of the witness. *Commonwealth v. St. Germain*, 381 Mass. 256, 262 (1980). Some statements of persons who may not be prospective witnesses must be produced for defense discovery pursuant to other provisions, such as police reports

included in this subdivision, co-defendants' statements pursuant to subdivision (i), grand jury minutes and relevant testimony pursuant to subdivision (ii), exculpatory statements pursuant to subdivision (iii), and statements made by or in the presence of an identifying witness relevant to the issue of identity pursuant to subdivision (viii).

This subdivision also mandates automatic discovery of any relevant reports of physical examinations or scientific tests or experiments. Often but not always, these will be in conjunction with expert opinion evidence, which must be produced pursuant to subdivision (vi). Under this provision such reports must be produced if relevant, whether or not intended for use at trial and whether or not prepared by an expert. When tests of physical evidence have been conducted by the Commonwealth, the defense also has a right of access to that evidence to conduct its own independent tests, at least unless the testing of another available item would be as probative on the issue. *Commonwealth v. Neal*, 392 Mass. 1, 10 (1984); *Commonwealth v. Nicholson*, 20 Mass. App. Ct. 9, 16 n.4 (1985). Regarding access to the government's evidence for investigation generally, see *California v. Trombetta*, 467 U.S. 479, 485 (1984) (Sixth Amendment right); *Commonwealth v. Balliro*, 349 Mass. 505 (1965) (art. 12 right).

**(a)(1)(A)(viii). Identification procedures and statements.**

Under this subdivision promulgated in 2004, the Commonwealth must provide automatic discovery of any statements made by, or in the presence of, an identifying witness if relevant to the issue of identity or to the fairness or accuracy of the identification procedures. It must also provide a summary of identification procedures to the defense.

Many cases are not "wrong man" cases. In such cases, if there have been no identification procedures the prosecution is not required to do anything under this subdivision. But where identification is at issue and procedures have been used they should be disclosed. *Commonwealth v. Dougan*, 377 Mass. 303, 316 (1979) (the due process right to fair identification procedures "would mean little if it did not carry with it the right to be informed of the details of any out-of-court identification, even if it were not used at trial"). Prior Massachusetts case law (as well as the constitutional obligation to disclose exculpatory evidence) affords the defendant a right to discover whether the witness previously failed to identify him. *Commonwealth v. Clark*, 378 Mass. 392, 403 (1979).

**(a)(1)(A)(ix). Promises, rewards or inducements made to prospective witnesses.**

Such inducements offered by the prosecution affect the credibility of the witness, and the defense is constitutionally entitled to discover it. See *Commonwealth v. Hill*, 432 Mass. 704, 715 (2000); *Gigilo v. United States*, 405 U.S. 150, 154-55 (1972); *Commonwealth v. Luna*, 410 Mass. 131, 139-40 (1991). An implicit quid pro quo may exist, and must be disclosed, even in the absence of any explicit promise. Even if there are no explicit

promises, any implicit quid pro quo must be revealed. *Commonwealth v. Johnson*, 21 Mass. App. Ct. 28, 4041 (1985). Moreover, even if there is no quid pro quo by which consideration is given in return for testimony, any material understanding or agreement between the government and a key witness or his attorney must be revealed. *Commonwealth v. Collins*, 386 Mass. 1, 11-12 (1982); *Commonwealth v. Gilday*, 382 Mass. 166, 175-76 (1980) (promise to witness' attorney not known to witness must be disclosed); *California v. Trombetta*, 467 U.S. 479, 485 (1984).

This subdivision requires the Commonwealth to disclose promises, rewards or inducements to only those witnesses it intends to present at trial. However, this obligation does not exhaust the Commonwealth's constitutional obligation to disclose all exculpatory evidence, or its parallel obligation under subdivision (iii) of this Rule. Such exculpatory evidence could, for example, include a promise or inducement made to a hearsay declarant whom the Commonwealth does not intend to present at trial.

***(a)(1)(B). Reciprocal discovery to the prosecution.***

Originally, Rule 14(a)(3) (as then numbered) provided that a court could order reciprocal discovery to the prosecution in its discretion. This provision derived from then-recent holdings of the Supreme Court relative to the rights of the prosecution to discover the defendant's case.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either ***by the prosecution*** or by the defense.

*United States v. Nixon*, 418 U.S. 683, 709 (1973) (emphasis supplied). Under these cases, the prosecution was empowered to call upon the power of the court to compel production of evidence which will facilitate full disclosure of all the relevant facts. *United States v. Nobles*, 422 U.S. 225 (1975). See *Commonwealth v. Hanger*, 377 Mass. 503 (1979); *Blaisdell v. Commonwealth*, 372 Mass. 753 (1977); *Commonwealth v. Edgerly*, 372 Mass. 337 (1977); *Commonwealth v. Lewinski*, 367 Mass. 889, 903 n. 10 (1975).

Revisions to Rule 14 in 2004 expanded the defense obligation by making reciprocal discovery mandatory, not discretionary. Under Rule 14(a)(1)(B), when the prosecution certifies that it has disclosed and made available the discoverable items it has, it is entitled to automatic reciprocal discovery of specified categories of defense evidence. Any differences between the obligations on the defense and prosecution result from asymmetrical constitutional requirements. There are two, deriving from the defendant's

right to due process and privilege against self-incrimination. First, the defense obligation is limited to evidence it intends to introduce at trial, whereas the prosecution must turn over some evidence it may intend not to use (and in the case of exculpatory evidence, is constitutionally required to do so). Since its promulgation in 1979, Rule 14 has limited reciprocal discovery to “intended” defense evidence because the U.S. Supreme Court case of *Williams v. Florida*, 399 U.S. 78 (1970), upheld the constitutionality of prosecutorial discovery only on the basis of this limitation. According to *Williams*, the Fifth Amendment privilege limits prosecutorial discovery to evidence the defendant intends to introduce. Intention in this context is, of course, fluid as investigation and discovery progress and the defendant is subject to the continuing duty imposed by subdivision (a)(4), *infra*. The second difference between the prosecution and defense obligations is in the order of disclosure: the prosecution gets its discovery only after it has produced discovery for the defense. In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Supreme Court found reversible error, in violation of due process, for the prosecution to receive categories of discovery without discovery of those same categories to the defense. To assure against such reversible error, and to allow defendants to assess what evidence they should introduce as required by the *Williams* “intended evidence” constitutional limitation, the Rule provides for defense discovery to take place first.

Under subdivision (a)(1)(B), automatic reciprocal discovery to the prosecution commences only after the Commonwealth has delivered all defense discovery required pursuant to the automatic discovery provisions of (a)(1)(A) and any other extant discovery orders. After that point, and by a date agreed to by the parties or ordered by the court, the defense is obligated to provide the Commonwealth with discovery of the names, addresses, dates of birth, and statements of its intended witnesses; and of every relevant item described in subdivisions (a)(1)(A) (vi), (vii), and (ix) that it intends to use at trial. In *Commonwealth v. Reynolds*, 429 Mass. 388 (1999), a pretrial agreement signed by the parties obligated defense counsel to provide not only statements of witnesses it intended to introduce, but also statements of Commonwealth witnesses that it intended to use in cross examination. The specified obligations under this subdivision do not go so far. Just as subdivision (a)(1)(A)(vii) requires the Commonwealth to disclose the statements of its own intended witnesses, subdivision (a)(1)(B) requires the defense to provide discovery of the statements of its own witnesses, not all witnesses. Discovery of other statements must be pursued by motion.

A separate provision in this Rule affords the prosecution notice of certain defenses if the defendant intends to assert one of them at trial. As discussed *infra*, under subdivision (b), the defense must provide notice and/or discovery if it intends to defend on the basis of

alibi, lack of criminal responsibility, or the existence of a license, claim of authority or ownership, or exemption.

***(a)(1)(C). Stay of automatic discovery; sanctions.***

According to this subdivision, the automatic discovery provisions of subdivision (a)(1) which stem directly from the Rule “shall have the force and effect of a court order.” If a party violates one of its automatic discovery obligations, the court may impose any of the sanctions permitted for non-compliance with a court order under subdivision 14(c). *Id.*

This provision also allows a party to seek a judicial determination of whether an item should not be subject to discovery, notwithstanding its inclusion in the automatic discovery regime. If a party has good cause for declining to provide such discovery, it should move for a protective order. This subdivision provides that the filing of such a motion stays production of the item pending a ruling by the court.

***(a)(1)(D). Record of convictions of the defendant, codefendants and prosecution witnesses.***

Under this provision, at arraignment the court must issue an order to the Probation Department, directing it to deliver to all parties its record of all prior complaints, indictments, and dispositions of the defendants and all witnesses identified pursuant to subdivision (a)(1)(A)(iv). Under the latter provision, the Commonwealth must notify the Probation Department of its intended witnesses. The court’s order must also require the Probation Department to provide this information no later than 5 days after it has been notified by the Commonwealth of its witnesses. See also Reporter’s Notes to (a)(1)(A)(iv).

***(a)(1)(E). Notice and preservation of evidence.***

Under this provision promulgated in 2004, if the prosecutor becomes aware of the existence of an item that would be subject to mandatory discovery but for the fact that it is not within the prosecutor’s possession, custody or control, the prosecutor must notify the defendant of the existence (and if known, the location) of the item. The defendant may then move for an order requiring the individual or entity in possession of the item to preserve it for a specified period of time.

This subdivision does not require the prosecution to search for new evidence. It applies only to evidence already known to exist without inquiry; and only to evidence held by independent third parties who are not part of the prosecution team and thus not subject to rule 14 discovery. In addition to insuring that the defense is aware of potentially significant evidence known to the prosecution, this provision is intended to place the defendant in a position to move the court for an order preventing destruction of the evidence so that a subsequent defense subpoena may be effective. To provide a party or independent witness



with recourse when a preservation order is inappropriate or unnecessary, the rule provides for motions to vacate or modify the preservation order, or to protect the probative value of the evidence by alternative means.

***(a)(2). Motions for discovery.***

Although most discovery is made automatic under the rule, there may be additional items not encompassed by Rule (a)(1)(A) that are properly discoverable. Rule 14(a)(2) provides for motions to discover such material. Such a motion may only be made for discovery of material and relevant evidence that is not encompassed by the automatic discovery provisions; if items in the latter category are not produced, the proper response is to file a motion to compel discovery or, in an appropriate case, a motion for sanctions under (a)(1)(C).

The timing and deadlines for discovery motions are set out in Rule 13(d)(1). Additionally, because the Commonwealth must provide discovery before it can obtain reciprocal discovery, subdivision (a)(2) provides that the Commonwealth may file a motion for discovery only after it has filed a Certificate of Compliance under subdivision (a)(3).

Nothing in this Rule is intended to prohibit the court from ex parte consideration of discovery motions in appropriate circumstances, consistent with law.

***(a)(3). Certificates of compliance.***

Under this subdivision, each party must file a certificate of compliance when it has met its automatic or court-ordered discovery obligations (other than disclosure of expert reports, which may be written late in the case). The certificate must identify each item provided.

The certificate is properly filed when, to the best of its knowledge and after reasonable inquiry, the party has provided discovery of all covered items it then has. The provision recognizes that additional discovery will likely occur as new information and witnesses are obtained, and mandates a supplemental certificate for that purpose.

***(a)(4). Continuing duty.***

This is taken from Rule 3.220(f) of the Florida Rules of Criminal Procedure and has a counterpart in the Federal Rule, the New Jersey Rule and the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970). This subdivision imposes a continuing duty to promptly provide court-ordered discovery as additional information is acquired. The duty continues throughout the trial, *Commonwealth v. Costello*, 392 Mass. 393 (1984), and includes an obligation to correct previous disclosures that have turned out to be inaccurate. *Commonwealth v. Borans*, 379 Mass. 117, 153 (1979); *Commonwealth v. Gilbert*, 377 Mass. 887, 893 (1979).

***(a)(5). Work product.***

Work product is protected under the federal rule and the ABA Standards, *supra*. The sanctity of a party's "work product" is a well recognized principle that was specifically approved by the Supreme Court relating to its application to discovery under the Federal Rules of Civil Procedure, *Hickman v. Taylor*, 329 U.S. 495 (1947). The principle has equal applicability to criminal discovery.

The definition of "work product" is drawn in part from Rules of Criminal Procedure (ULA) rule 421(b)(1)(1974). The subdivision defines "work product" as limited to portions of documents containing the "legal research, opinions, theories or conclusions of the adverse party or its attorney and legal staff" or statements of the defendant made to counsel or counsel's legal staff. Although witness statements obtained by counsel are not deemed work product under this definition, see *Commonwealth v. Paszko*, 391 Mass. 164, 186-88 & n.27 (1984) and *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 140 (2001), in some cases "witness statements may be so commingled with counsel's theories, or so revealing of counsel's mental processes by virtue of the areas covered, as to be unsegregable and constitute work product." Blumenson, Fisher and Kanstroom, *Massachusetts Criminal Practice* (1998), Sec. 16.2C, citing *Commonwealth v. Lewinski*, 367 Mass. 889, 902 (1975) and *Upjohn v. United States*, 449 U.S. 383, 400-01 (1981).

***(a)(6) (Protective orders) and (a)(7) (Amendment of discovery orders).***

Although Rule 14(a) provides for automatic, mandatory discovery, if danger or abuse can be shown, or a privilege preventing disclosure applies, discovery need not be granted. The power of the court to restrict the scope of otherwise permissible discovery is recognized in the Federal Rule, the New Jersey Rule, the Florida Rule, and the ABA Standards, *supra*.

Protective orders are designed for the unusual case in which the granting of discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person. Although a party must move for such an order, this does not imply that the moving party always has the burden of proof. Ordinarily the party or person opposing discovery has the burden of showing why the discovery of requested materials must be denied or granted subject to restriction, but in certain cases including some privileges, statutory or case law may provide that the party seeking disclosure has the burden of proof. Therefore the 2004 revision added to this subdivision an explicit recognition that "nothing in this provision shall be deemed to alter the allocation of the burden of proof with regard to the matter at issue, including privilege."

With respect to automatic discovery mandated under subdivision (a)(1), a motion for a protective order stays the discovery obligation pending a ruling by the court. Subdivision (a)(1)(C). With respect to discretionary discovery sought by motion under subdivision (a)(2),

a protective order may be sought only to restrict (and not prevent completely) the scope of discovery, because if reasons exist to wholly deny discovery ab initio, it is within the discretion of the court to deny the discovery motion, without requiring the opponent to the motion to seek a protective order. If what is sought is the modification of an existing discovery order the following subdivision, (a)(7), provides the appropriate remedy.

The provisions of these subdivisions that the court may, in certain situations, grant discovery to a defendant on condition that the material to be discovered be available only to counsel for the defendant, is merely a corollary to that sentence of subdivision (a)(6) which gives the court the power, upon a sufficient showing, to deny, restrict, or defer discovery or inspection. Fed. R. Crim. P. 16(d) and ABA Standards § 4.4 give the judge this same power. The commentary accompanying the ABA Standard indicates that this restriction on disclosure means “such adjustment of the time, place, recipient, and use of disclosures as may commend themselves in the particular case.” ABA Standards, *supra*, comment at 102. Since it is constitutionally permissible to limit pretrial discovery in criminal cases, *United States v. Randolph*, 456 F.2d 132 (3d Cir. 1972), there should be no objection to the Commonwealth’s giving material only to defendant’s counsel in certain situations, which is preferable to denying discovery altogether. It is contemplated that this provision of Rule 14 will sometimes be used to prevent a defendant from seeing his own psychiatric report. In some instances, the mental well-being of the defendant could be adversely affected if he or she has access to such a report. *United States v. Moody*, 490 F.2d 866 (5th Cir. 1974). Although the defendant in *Moody* had been convicted, the same rationale is applicable to the defendant awaiting trial.

Nothing in this Rule is intended to prohibit the court from ex parte consideration of a motion for a protective order in appropriate circumstances, consistent with law.

#### ***(a)(8). Waivers and agreements to alter discovery rights.***

Rule (a)(8) allows the parties to change discovery requirements by waiver or agreement, including both the scope and timing of discovery. The waiver or agreement must be in writing, signed by the waiving party or the parties to the agreement, identify the specific items included, and be served upon all parties.

#### **Subdivision (b). Special procedures.**

Rule 14(b), governing notice to the prosecution of certain intended defenses, was left essentially unchanged by the 2004 revision, except for the substitution of gender neutral language. Under this provision, the prosecution is entitled to notice, and in some cases discovery, when the defendant intends to defend on the basis of alibi, lack of criminal responsibility, or the existence of a license, claim of authority or ownership, or exemption.

The philosophy and provisions of this subdivision are drawn from *Commonwealth v. Edgerly*, 372 Mass. 337 (1977); *Blaisdell v. Commonwealth*, 372 Mass. 753 (1977); and a number of other sources. See *Commonwealth v. Hanger*, 377 Mass. 503 (1979); *Commonwealth v. Lewinsky*, 367 Mass. 889, 902-03 and n. 10 (1975); Fed. R. Crim. P. 12.1, 12.2; Fla. R. Crim. P. 3.200; Rules of Criminal Procedure (ULA) rule 423(a)(1) (2) (1974); National Advisory Commission on Criminal Justice Standards and Goals, Courts, standard 4.9 (1973).

The Supreme Court in *Williams v. Florida*, 399 U.S. 78 (1970), held that a prosecutor could obtain discovery from a defendant by requesting information pertaining to evidence which the defendant intended to offer at trial without violating the fifth amendment privilege against self-incrimination. Although the defense is compelled to make an accelerated determination of the evidence it is to introduce at trial, the nature of this compulsion is such that it is not unconstitutional. While the holding of the Supreme Court related only to the discovery of a defendant's prospective alibi defense, the decision indicates that the rule announced is applicable to other forms or prosecutorial discovery as well. See *Commonwealth v. Lewinsky*, 367 Mass. 889, 903 n 10 (1975). The types of disclosures mandated by subdivision (b)(1)-(3) occur in those situations where in fairness the Commonwealth is entitled at least to notification.

***(b)(1). Notice of alibi.***

Notice-of-alibi rules have been in existence at least since 1927 and as of 1978 at least half the states had such rules. See *Williams v. Florida*, 399 U.S. 78, 81-82 (1970). The substance of this subdivision is taken from *Commonwealth v. Edgerly*, 372 Mass. 337, 344-45 (1977).

In *Gilday v. Commonwealth*, 360 Mass. 170 (1971), the Supreme Judicial Court, mindful of the implications of the Supreme Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970), held that discovery by the prosecution of the defendant's intent to interpose an alibi defense and of the names of any prospective witnesses in support of the alibi violated due process because in Massachusetts a defendant did not have an equal right to discovery from the prosecution. Nearly all a defendant's rights to discovery had been subject to judicial discretion under Massachusetts law. The Supreme Court in *Wardius v. Oregon*, 412 U.S. 470 (1973), specifically held that reciprocity in discovery rights was a constitutional prerequisite to the validity of prosecutorial discovery. That requirement is supplied by subdivisions (b)(1)(B)-(C).

The purpose of such a rule is two-fold. First, alibi defenses are the most frequently and easily fabricated defenses. See, for example, *Commonwealth v. Harris*, 364 Mass. 236, 238 (1973). By requiring the defendant to give the Commonwealth pretrial notice of his intent to interpose such a defense and a list of witnesses to be used in support of the alibi, the

defendant is prevented from using an eleventh hour defense, and the Commonwealth is given the tools necessary to uncover fabrication. Fairness to the defendant is insured by granting him discovery of the identities of rebuttal witnesses. Second, the need to grant continuances on the basis of surprise at trial will no longer exist.

As the Edgerly court observes, if, in the court's discretion, no other order is appropriate to serve the purposes of this rule, it may exclude the testimony of any undisclosed witness offered by either party as to the defendant's absence from, or presence at, the scene of the alleged offense. 372 Mass. at 345. Exclusion of such alibi testimony, other than the defendant's, is authorized in subdivision (b)(1)(D). See *Commonwealth v. Cutty*, 47 Mass. App. Ct. 671, 673 (1999). If a defendant against whom a sanction is imposed is convicted, he or she may, of course, preserve for argument on appeal the issue of whether imposition of that sanction amounted to an abuse of discretion or the denial of any constitutional right. *Commonwealth v. Edgerly*, supra at 339 and 343. See generally *Commonwealth v. Reynolds*, 429 Mass. 388, 398-399 (1999); *Commonwealth v. Durning*, 406 Mass. 485, 496 (1990); *Commonwealth v. Chappee*, 397 Mass. 508, 518 (1986); *Taylor v. Illinois*, 484 U.S. 400 (1988). In *Commonwealth v. Hanger*, 377 Mass. 503 (1979), the procedure authorized by this subdivision was substantially approved in the absence of any rule, even though the Commonwealth's motion was not presented until the second day of trial.

***(b)(2). Notice of intent to defend by lack of criminal responsibility or mental incapacity.***

The subject matter of this subdivision was treated by the Supreme Judicial Court in *Blaisdell v. Commonwealth*, 372 Mass. 753 (1977), and the procedures contained herein substantially restate those dictated by the court in that opinion. At its inception, this subdivision governed only a prospective insanity defense, but since then the Supreme Judicial Court has extended its scope to govern other defense claims based on mental impairment or incapacity, including mental incapacity to entertain mens rea, *Commonwealth v. Diaz*, 431 Mass. 822 (2000), or to voluntarily waive Miranda rights, *Commonwealth v. Ostrander*, 441 Mass. 344 (2004).

Provisions requiring notice of an intent to rely upon a defense of lack of criminal responsibility or diminished mental capacity have a different purpose than notice-of-alibi provisions. The latter, as noted above, are directed at preventing "eleventh-hour" or fabricated alibis. On the other hand, because rebuttal of an insanity defense requires a degree of expertise on the part of a cross-examiner that can only be gained through pretrial research, this subdivision is intended to meet the need of a prosecutor to become familiar with the complex nature of this type of defense.

The Supreme Judicial Court in *Gilday v. Commonwealth*, 360 Mass. 170 (1971), upheld an order to the defendant to disclose his intent with regard to the interposition of a defense of not guilty by reason of insanity despite the fact that the system of discovery then in effect was non-reciprocal. Implicit in the court's opinion is the fact that due process did not require reciprocation by the Commonwealth because only notice of intent to interpose the defense, and not the identity of the defendant's witnesses nor the evidence intended to support of that defense, was required. In short, the only response by the Commonwealth would be that opposition to that defense would be presented, which does not reasonably require notice.

As the court recognized in *Blaisdell v. Commonwealth*, the privilege against self-incrimination is not implicated by a mere notice requirement. 372 Mass. at 767. Nor is there anything in that privilege which precludes

*an order requiring a defendant to reveal on motion of the prosecution the information of (a) whether a defendant pursuant to such defense intends to offer expert testimony thereon; (b) the names and addresses of such expert witnesses as the defense intends to call; (c) whether a defendant's experts intend to rely in whole or in part on statements of the defendant pertaining to his mental state at or about the time of the commission of the alleged crime or as it may be otherwise relevant to the issue of his mental responsibility therefor.*

Id. That information is required by subdivisions (b)(2)(A)(ii)-(iii) of this rule. If the defendant files the notice of intent, the Commonwealth is subject to the reciprocity requirements of this rule and as imposed by *Commonwealth v. Edgerly*, 372 Mass. 337, 342 (1977); *Blaisdell v. Commonwealth*, 372 Mass. 753 (1977).

If in answer to subdivision (b)(2)(A)(iii) the defendant responds that his expert witnesses intend to rely upon statements of the defendant as a foundation for their testimony, or if that fact becomes apparent from inquiry by the judge or developments in the case, the judge may order that the defendant submit to a psychiatric examination. (b)(2)(B).

If...a defendant voluntarily submits to psychiatric interrogation as to his inner thoughts, the alleged crime and other relevant factors bearing on his mental responsibility and, on advice of counsel, voluntarily proffers such evidence to the jury, we feel that the offer of such expert testimony based in whole or in part on a defendant's testimonial statements constitutes a waiver of the privilege [against self-incrimination] for such purposes....In short, by adopting this approach, a defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial evidence in essentially the same way as if he himself has

testified....Under such a view there would be no violation of his privilege should the court then order him under c. 123, § 15, to submit to psychiatric examination so that the jury may have the benefit of countervailing expert views, based on similar testimonial statements of a defendant in discharging its responsibility of making a true and valid determination of the issues thus opened by a defendant.

Blaisdell v. Commonwealth, 372 Mass. 753, 765-766 (1977) (citation omitted). The privilege against self-incrimination does not bar the Commonwealth's use of evidence which incriminates the defendant, but rather the compelled production of such evidence by the defendant; yet it is clear that an examination pursuant to this subdivision constitutes compelled production. Blaisdell v. Commonwealth, supra, 372 Mass. at 758. See also Commonwealth v. Baldwin, 426 Mass. 105 (1997); Commonwealth v. Wayne W., 414 Mass. 218, 228-30 (1993). Therefore, if the psychiatric report contains evidence of a testimonial character, it is not to be made available to either party unless the defendant is to testify on his own behalf or is to offer expert testimony based on his statements ([b](2)(B)(iii)(c)) or unless the defendant, by motion, requests that it be made available. ([b](2)(B)(iii)(b)). Ordering the examination to be conducted prior to a defendant's formal waiver of the privilege against self-incrimination is justified on the basis that:

*To require the Commonwealth to wait may...well cause it to be disadvantaged in meeting the issues raised by a defendant's evidence by virtue of the fact that its expert witnesses will lack adequate time to examine properly a defendant and his evidence in order to prepare for trial. Alternatively, a continuance of the trial may cause needless expense to the Commonwealth, unnecessary inconvenience to the court and to the jurors, and disruption of the progress of the trial which may cause harm to either the prosecution or the defense. To require the Commonwealth to wait until such a waiver occurs at trial seems not only inexpedient and unwise but also unnecessary.*

Blaisdell v. Commonwealth, supra, 372 Mass. at 767.

***(b)(3). Notice of defenses based on license, authority, ownership or exemption.***

This subdivision, promulgated in 1979, requires the defendant to furnish the prosecution with notice of his intent to rely upon a defense based upon a license, claim of authority or ownership, or exemption.

A "license" is defined as a right granted by the Commonwealth or other competent authority to do a particular act or carry on a particular business which, without such license, would be unlawful. A "claim of authority" is an assertion that the claimant has

received an express or implied right to do an act from one lawfully empowered to grant such right. A “claim of ownership” is an assertion that the claimant has a right of possession enforceable in a court. An “exemption” is a release from a duty or obligation to which others are subject.

The requirement of disclosure in this subdivision is reasonable when considered in light of “the proposition that the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.” *Wardius v. Oregon*, 412 U.S. 470, 473 (1973).

The concept of mandating notice of criminal defenses other than alibi and insanity, subdivisions (b)(1)-(2) *supra*, was advocated by the American Bar Association in the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970):

*Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of **any** defense which defense counsel intends to use at trial...*

*Id.*, § 3.3 (emphasis supplied).

Considerations of reciprocity, dealt with by the United States Supreme Court in connection with notice-of-alibi statutes in *Wardius v. Oregon*, 412 U.S. 470 (1973) and *Williams v. Florida*, 399 U.S. 78 (1970), and by the Supreme Judicial Court in *Gilday v. Commonwealth*, 360 Mass. 170 (1971), are inapposite to subdivision (b)(3). The *Williams-Wardius* cases hold that state statutes requiring notice to be given the prosecution that an alibi defense is to be raised at trial, with the names of witnesses to be called in support of the alibi, are constitutionally valid only if the defendant is allowed reciprocal rights to receive the names of governmental rebuttal witnesses. The statutes in those decisions, unlike Rule 14(b)(3), involved the furnishing of prosecutors with both notice of, and information pertaining to, the intended defense. See subdivisions (b)(1) and (b)(2), *supra*. It was to this information gathering aspect of the Oregon and Florida statutes that the Supreme Court addressed itself:

*It is fundamentally unfair to require the defendant to divulge **the details** of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.*

*Wardius*, *supra* at 476 (emphasis added).

Subdivision (b)(3) involves the giving only of notice. The defendant is not required to divulge the details of his intended defense. Mere notification of intent to raise a defense without



more does not trigger considerations of reciprocity. See *Commonwealth v. Gilday*, 360 Mass. 170 (1971); *Blaisdell v. Commonwealth*, 372 Mass. at 764, 767 (1977).

The sanction for failure to comply with the requirement of subsection (b)(3) is drawn from Fed. R. Crim. P. 12.1 and 12.2. See also ABA Standards, *supra*, § 4.7. The court may “for cause shown” ease or lift the requirements of this subdivision.

### Subdivision (c). Sanctions for noncompliance.

Sanctions may be issued under this subdivision for violations of discovery obligations established either by the court’s order or by the automatic discovery provisions of the rule. The automatic discovery obligations of subsections (a)(1)(A)(discovery to the defense) and (a)(1)(B)(discovery to the prosecution) stem from the rule itself rather than an order issued by the court, but subdivision (a)(1)(C) provides that they “have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c).”

The general sanction provision of subdivision (c)(1) is paralleled by Fed. R. Crim. P. 16(d)(2) and New Jersey R. Crim. P. 3:13-3(f). The power to exclude alibi evidence other than the defendant’s testimony is recognized in *Commonwealth v. Edgerly*, 372 Mass. 337, 342 (1977), and is express in subdivision (b)(1)(D), *supra*. See Federal Rule 12.1; ABA Standards Relating to Discovery and Procedure Before Trial § 4.7(a) (Approved Draft, 1970). Subdivision (b)(2)(B), *supra*, provides the sanction for failure of the defendant to comply with a court-ordered psychiatric examination.

“Rights and duties are ephemeral indeed without remedies.” ABA Standards, *supra*, comment at 107. Subdivision (c)(1) is intended to provide the general rule and is based on that assumption that the trial court is in the best situation to consider the opposing arguments concerning a failure to comply with a discovery order and to fashion an appropriate remedy. Remedies for non-compliance with discovery requirements could include a further order for discovery, a continuance, exclusion of certain testimony, or “such other order as [the Court] deems just under the circumstances.” (c)(1). A continuance or in some cases a mistrial may be the proper remedy when delayed disclosure leaves the defendant unable to “make effective use of the evidence in preparing and presenting his case.” See *Commonwealth v. Baldwin*, 385 Mass. 165, 175 & n.10 (1982); *Commonwealth v. St. Germain*, 381 Mass. 256, 262-63 (1980). (There is, it should be noted, a statutory limitation on the court’s power to grant a continuance without the defendant’s consent. When the defendant is in custody, General Laws c. 276, § 35 provides a thirty day limit in such instances.) A dismissal barring retrial may be required when a

discovery violation has resulted in irreparable harm to the defendant's opportunity to obtain a fair trial.

Although the court may exercise its general sanction power under subdivision (c)(2) to exclude evidence, it is generally better to grant each party the freedom to present all relevant evidence at trial. However, in regard to alibi evidence, there is sufficient likelihood of abuse to require specifically empowering the court to exclude extrinsic alibi evidence other than the defendant's testimony, and this is specifically authorized by section (b)(1)(D). A court should only employ this sanction, however, when convinced that a failure to comply with an order was deliberate and prejudicial to the Commonwealth. Subdivision (c)(2) also provides that evidence concerning the defense of lack of criminal responsibility cannot be excluded except as provided by subdivision (b)(2).

### Subdivision (d). Definition of "statement."

The definition of the term "statement" was initially drawn from 18 USC § 3500(e)(1)-(2) (1969, Supp. 1976) and *Commonwealth v. Lewinski*, 367 Mass. 889 (1975). Definition (d)(1) defines "statements" which have been written by the percipient witness himself or herself. Definition (d)(2) defines "statements" which have been contemporaneously recorded by someone other than the speaker or writer.

The definition in (d)(1) was amended in 2004 to delete the requirement that writings by witnesses be signed or otherwise adopted by the author. In *Commonwealth v. Lewinski*, 367 Mass. 889, 901-903 (1975), the Court stated that without any showing of particularized need, a defendant was entitled to all "prior written statements of prosecution witnesses which are available to the prosecution and are related to the subject," and subdivided this into three categories of mandatorily discoverable statements: "any statement made by the witness and in some definite way approved by him, a transcript of a contemporaneous verbatim or substantially verbatim stenographic or other recording of an oral statement by the witness, and a written report consisting of a statement by the witness." The 2004 revision reflects a decision that the definition of written statements made by a witness should encompass written statements of a percipient witness which have not been formally adopted by the witness, and the third category in *Lewinsky*, although not without ambiguity, implies as much. Under 14(d)(1), these will have been written by the percipient witness himself, and under 14(d)(2), such statements must still be "**a substantially verbatim** recital of an oral declaration and which is **recorded contemporaneously** with the making of the oral declaration" (emphasis added). In both cases, such evidence is generally relevant at trial; for example, one need not show a prior statement was adopted as accurate and complete by the writer in order to admit and demonstrate its inconsistencies. Prior informal statements, not intended for court, are not only often

admissible at trial but often more probative than formal signed statements in anticipation of litigation. On this view, if the police have taken a statement of a witness who will testify, it should be discoverable to the defense.

However, the revised definition does not extend to “drafts or notes that have been incorporated into a subsequent draft or final report.” It would be unnecessary and burdensome to require that every rough draft of a police report or other statement to be turned over in addition to the final one.

## Subdivision (e)

Subdivision (e), which formerly specified the time limits for discovery, was deleted as part of the 2004 revisions. In the amended rules, the deadlines for automatic, non-motion discovery are detailed in Rule 14(a)(1)(a) and (b), and the deadlines for discovery (and other) motions are found in Rule 13(d).

# Rule 14.1: Pretrial Reciprocal Discovery from the Defense

## (a) Defense Duties

Following the prosecutor’s delivery of all discovery required pursuant to Rule 14(b), and any court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecutor and permit the prosecutor to discover, inspect, and copy any material and relevant evidence discoverable under Rule 14(b)(1)(F), (G), and (H) which the defendant intends to offer at trial, including the names, addresses, known contact information, dates of birth, and written statements of those persons whom the defendant may call as witnesses, and any promise, reward, or inducement sought, requested by, offered to, or given to such witness. As used in this rule, the term “written statement” shall have the meaning defined in Rule 14(b)(3). The judge may inquire of the defense what actions were taken to achieve compliance with this rule.

## (b) Continuing Duty

If the defendant subsequently learns of additional items or information which would have been subject to disclosure or notification under this rule, the defendant shall promptly disclose to or notify the prosecutor of its acquisition of such additional items or information in the same manner as required for initial discovery under this rule.

# Rule History

*Adopted November 26, 2024, effective March 1, 2025.*

## Reporter's Notes

*(2025)*

*[Rule 14.1 replaces prior Rule 14(a)(1)(B) (Reciprocal Discovery for the Prosecution)]*

With two exceptions, Rule 14.1 makes no substantive changes to what was previously Rule 14(a)(1)(B). It combines the reciprocal discovery provision (formerly Rule 14(a)(1)(B)) and the provision making these discovery obligations continuing duties (formerly Rule 14(a)(4)) into a new rule. Counsel should note that the definition of “statement” as used in Rule 14.1 is provided in Rule 14(b)(3).

When the prosecution complies with its discovery obligations, the automatic discovery obligations of the defendant arise. These obligations parallel those of the prosecutor in Rule 14(b)(1)(F), (G), and (H), provided the defendant intends to offer these materials at trial. Additional discovery may be sought by motion. See Rule 14.2(d).

Rule 14.1 sets forth discovery duties for the defense in section 14.1(a) and specifies in section 14.1(b) that these are continuing duties. This is the same continuing duty to which the prosecutor is subject under Rule 14(d).

The first substantive change to Rule 14.1 is the addition of “known contact information” that must be disclosed concerning witnesses the defense intends to call at trial. The same additional contact information is also provided in discovery from the prosecution concerning its prospective trial witnesses for the same reasons. See Rule 14(b)(1)(C).

The second substantive change to Rule 14.1 is the affirmative statement of the judge’s express authority to inquire about actions taken to achieve compliance with this rule. This is the same affirmative statement that is in Rule 14(a)(2)(E) with regard to actions the prosecutor has taken to achieve compliance with the prosecution’s discovery obligations. Any disclosures concerning actions taken in a matter should be made bearing in mind the duties of confidentiality and the attorney-client privilege. See Mass. R. Prof. C. 1.6.

As under the prior rule, either party may face sanctions for non-compliance with its discovery obligations. See Rule 14.2(j). As under the prior rule, the discovery obligations in 14 and 14.1 do not extend to work product. See Rule 14.2(f).

# Rule 14.2: Pretrial Discovery Procedures

## (a) Authority of Rules; Stays

Rule 14(b) and Rule 14.1 shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under this rule. However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to Rule 14.2(g) and production of the item shall be stayed pending a ruling by the court.

## (b) Record of Court Activity of the Defendant, Codefendants, and Prosecution Witnesses

Upon request made in such form as the court may prescribe, the court shall order the Probation Service to provide the defendant with the record of court activity of all defendants and all witnesses identified pursuant to Rules 14, 14.1, and 14.3.

## (c) Notice and Preservation of Evidence

### (1)

Upon receipt of information that any item described in Rule 14(b) exists that is not within the possession, custody, or control of the prosecutor, the prosecuting office, or the prosecution team as defined in Rule 14(a)(1), the prosecutor shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it.

### (2)

At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The judge shall hear and rule upon the motion expeditiously. The judge may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

## (d) Motions for Discovery

The defendant may move, and following its filing of the Certificate of Compliance, the prosecutor may move, for discovery of other material and relevant evidence not required by Rule 14(b) or Rule 14 within the time allowed by Rule 13(d)(1).

## (e) Certificate of Compliance

When a party has provided all discovery required by Rule 14 or Rule 14.1 or by court order, it shall promptly file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items and information subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items or information provided.

## (f) Work Product

Unless otherwise required by law or court order, this rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff. This definition of work product does not include any items or information that the prosecutor is obligated to disclose as items or information favorable to the defense.

## (g) Protective Orders

Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of Rules 14, 14.1, or 14.2. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

## (h) Amendment of Discovery Orders

Upon motion of either party made subsequent to an order of the judge pursuant to Rules 14, 14.1, or 14.2, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting

discovery to a defendant upon the additional condition that the material to be discovered be available only to counsel for the defendant.

## (i) Waiver

A party may waive the right to discovery of an item, or to discovery of the item within the time provided in Rules 14, 14.1, and 14.2. The parties may agree to reduce or enlarge the items subject to discovery pursuant to Rules 14 and 14.1. Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

## (j) Sanctions for Noncompliance.

### *(1) Relief for nondisclosure*

For failure to comply with any discovery order issued or imposed pursuant to this rule, the judge may make a further order for discovery, grant a continuance, or enter such other order as the judge deems just under the circumstances, including but not limited to the exclusion of evidence, adverse jury instructions, dismissal of charges with or without prejudice, contempt proceedings, and other sanctions.

### *(2) Exclusion of evidence*

The judge may in an exercise of discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by Rule 14.4.

## Rule History

*Adopted November 26, 2024, effective March 1, 2025.*

## Reporter's Notes

*(2025)*

### Rule 14.2 Pretrial Discovery Procedures

*[This is a new section.]*

Rule 14.2 combines in one rule procedural and enforcement mechanisms for discovery. These include provisions governing the authority of the rules and stays of discovery

obligations (section 14.2(a)); obtaining the record of court activity of defendants and witnesses (section 14.2(b)); requiring notice and preservation of evidence in the possession of third parties (section 14.2(c)); authorizing motions for additional discovery (section 14.2(d)); requiring filing certificates of discovery compliance (section 14.2(e)); excluding work product from discovery obligations (section 14.2(f)); authorizing issuance of protective orders (section 14.2(g)); enabling the court to modify or amend discovery obligations (section 14.2(h)); allowing the waiver of discovery or for discovery by agreement (section 14.2(i)); and empowering the court to impose sanctions for noncompliance (section 14.2(j)).

## 14.2(a) Authority of Rules; Stays

*[This section replaces prior section 14(a)(1)(C) but makes no substantive change.]*

The provisions governing automatic discovery, from both the prosecution and the defense, have the force and effect of a court order without the separate issuance of a specific court order concerning them. Rule 14.2(a). When either party believes the other has not produced items or information subject to disclosure under these rules, it should move to compel production or seek sanctions for the nondisclosure under Rule 14.2(j).

Commonwealth v. Dirico, 480 Mass. 491, 502 (2018).

## 14.2(b) Record of Court Activity of the Defendant, Codefendants, and Prosecution Witnesses

*[This is a new section.]*

The defendant has constitutional and statutory rights to obtain criminal records of all defendants and witnesses. *Wing v. Commissioner of Probation*, 473 Mass. 368, 371 (2015); G. L. c. 218, § 26A. This section simplifies the method of obtaining these records.

The Massachusetts Probation Service maintains records of individuals' Massachusetts court activity. Providing these records in discovery is mandatory so a motion for discovery is unnecessary. However, in order to provide the appropriate records the Probation Service needs identifying information for the relevant individuals in each case.

Under the prior rule, at arraignment the court would order the Probation Service to provide the parties with records of defendants and witnesses within five days of its receipt from the prosecutor of identifying information for these persons at a future date. Delay in the Probation Service's receipt of identifying information for defendants and witnesses slowed disclosure of information to which defendants had a right to receive. Defendants seeking records would move to compel the Probation Service to provide them, which created



unnecessary litigation and further delay concerning the provision of information that is mandatory.

Under Rule 14.2(b), when the defendant receives identifying information concerning the defendants and witnesses required by Rule 14(b)(1)(C) and Rule 14.3, the defendant must request the records using the form designated by the court. The defendant may also request such records of witnesses whose identity will be disclosed pursuant to Rule 14.1. The court shall then order that the Probation Service provide the defendant with the requested records. *Commonwealth v. Martinez*, 437 Mass. 84, 95 (2002) (The “proper route for [a] defendant to obtain prior convictions of prospective witnesses from the Commonwealth is by requesting the judge to order the probation [service] to produce them.”).

Prosecutors separately have direct access to the record of court activity. The prosecutor’s access to records includes other information that is available to law enforcement entities, such as the Domestic Violence Registry. Prosecutors may also have access to federal criminal records. In appropriate cases these may be subject to disclosure under Rules 14(b)(2)(C)(i)(b) or 14(b)(2)(C)(i)(c).

## 14.2(c) Notice and Preservation of Evidence

*[This section renumbers but makes no change to prior section 14(a)(1)(E).]*

This section makes no substantive change to the prior rule. The duty of the prosecutor to notify the defendant of the existence of any item that is subject to automatic discovery but is not within the possession, custody, or control of the prosecutor, prosecuting office, or any member of the prosecution team should be read in conjunction with Rule 14(a)(2)(A)-(E). Rule 14.2(c)(1) requires that the prosecutor notify the defendant of the existence of any items subject to automatic discovery in the possession of third parties. Rule 14.2(c)(2) provides that either party may move for an order requiring that a third party preserve an item in its possession, custody, or control, and that such motions shall be heard expeditiously. Motions under Rule 14.2(c)(2) are distinct from summonses for witnesses or for the production of documents or objects under Mass. R. Crim. P. 17.

## 14.2(d) Motions for discovery

*[This section renumbers but makes no change to prior section 14(a)(2).]*

Additional discovery, beyond automatic discovery, is available by motion, subject only to it being relevant. *Commonwealth v. Bernardo B.*, 453 Mass. 158, 169 (2009) (“At the discovery stage, the question is whether the defendant has made a “threshold showing of relevance” under [prior] rule 14(a)(2).”). Discovery by motion may be particularly significant for pretrial

litigation as it enables addressing issues the opposing party may not intend to raise at trial. *Commonwealth v. Long*, 485 Mass. 711, 723-726 (2020) (In pursuing motion to suppress fruits of stop based on selective enforcement “defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances of the traffic stop; such discovery may include the particular officer’s recent traffic stops and motor-vehicle-based field interrogations and observations.”). “Discovery of items not included in the automatic discovery regime remains subject to the court’s discretion, and may be requested by pretrial motion.” *Commonwealth v. Lewis*, 468 Mass. 1001, 1001-1002 (2014) (Citing Reporter’s Notes (Revised 2004) to Rule 14, at 1506). Orders for such additional discretionary discovery must not be unfairly burdensome. *Id.* at 1001 n.3.

## 14.2(e) Certificate of compliance

*[This section renumbers but makes no change to prior section 14(a)(3).]*

This section makes no substantive change to the prior rule. Certificates of compliance must be promptly filed when each party has complied with its obligations for automatic discovery or any additional court-ordered discovery. Certificates must specifically identify each item provided. Notwithstanding the filing of a certificate of compliance, counsel have continuing duties of disclosure under Mass. R. Crim. P. 14(d) (for the prosecutor) and 14.1(b) (for the defense). These include an obligation to correct or supplement disclosures later learned to be incorrect or incomplete, and these duties continue throughout trial. *Commonwealth v. Frith*, 458 Mass. 434, 437 n.4 (2010); *Commonwealth v. O’Neal*, 93 Mass. App. Ct. 189, 198 & n.10 (2018) (Prosecutor’s failure to clarify “equivocal and incomplete discovery response” that booking video was “not available” because it had been destroyed violated its discovery obligation and entitled defendant to new trial.).

Certificates of compliance are affirmative representations to the court. As such, they must comply with the prohibition against an attorney knowingly making a false statement to a tribunal. Mass. R. Prof. C. 3.3(a). Unlike other pleadings, certificates of compliance necessarily concern matters of the lawyer’s personal knowledge, thus may only be made when the “lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.” Mass. R. Prof. C. 3.3(a), Comment, Par. 3. See *Frith*, 458 Mass. at 440-441 (Prosecutor’s duty of inquiry for compliance with discovery obligations extends beyond circumstances in which prosecutor learns of additional discoverable materials to impose an obligation to ask police prosecutor whether all discoverable materials in a case have been given the Commonwealth.).

## 14.2(f) Work Product

*[This section makes two changes to prior section 14(a)(5).]*

This section makes two changes to the prior rule. First, it adds a qualification that other law or court orders may require disclosure of work product. Second, it adds a qualification that work product does not include items or information that must be disclosed because they are favorable to the defense. *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 140 (2001) (While notes of victim witness advocates may be protected as work product, the prosecutor has an “affirmative duty” to review these notes, to inquire about conversations with victims, and to disclose any items or information in them favorable to the defense.). Where a party believes good cause exists for not providing disclosure due to the material being protected as work product, the party must file a motion for a protective order. Mass. R. Crim. P. 14.2(g). *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 650, n.10 (2020).

### 14.2(g) Protective Orders

*[This section makes no substantive change to prior section 14(a)(6).]*

### 14.2(h) Amendment of Discovery Orders.

*[This section makes no substantive change to prior section 14(a)(7).]*

### 14.2(i) Waiver

*[This section renumbers but makes no substantive change to prior section 14(a)(8).]*

### 14.2(j) Sanctions for Noncompliance

*[This section makes one change to the prior rule.]*

This section sets forth the judge’s authority to impose sanctions for noncompliance with discovery obligations and adds to the prior rule examples of possible sanctions. Rule 14.2(j)(1). Sanctions for noncompliance with discovery obligations or discovery orders must be “remedial in nature and tailored appropriately to cure any prejudice resulting from a party’s noncompliance and to ensure a fair trial.” *Commonwealth v. Issa*, 466 Mass. 1, 17 (2013) (citing *Commonwealth v. Carney*, 458 Mass. 418, 419 n.3 (2010) (internal quotations omitted)). This broad range of orders a judge may impose in response to a failure to comply with discovery orders may include further orders for discovery, continuances, exclusion of evidence, adverse jury instructions, dismissal with or without prejudice, or other appropriate steps. *Commonwealth v. Washington W.*, 462 Mass. 204, 215 (2012) (Holding trial judge’s dismissal with prejudice of indictments was not an abuse of discretion where judge properly found Commonwealth deliberately, willfully, and repeatedly failed to comply with discovery order.) *Contrast Frith*, 458 Mass. 434 (Commonwealth’s failure to conduct reasonable inquiry concerning existence of other material subject to discovery, although

mistaken, was not done in bad faith and imposition of punitive fine on prosecutor was an abuse of discretion).

The propriety of a sanction and what sanction is appropriate are distinct questions. *Commonwealth v. Edwards*, 491 Mass. 1, 7-9 & 9-12 (2022) (Commonwealth's failure to timely disclose certificate of service in defendant's prosecution for violating abuse protection order was sanctionable, even though defendant was aware of the missing certificate, because he structured his defense around its absence from the government's case-in-chief, but dismissal with prejudice was not an appropriate sanction because violation was not egregious misconduct.).

## **Rule 14.3: Pretrial Discovery of Affirmative Defenses; Self Defense and First Aggressor**

### **(a) Notice of Alibi**

#### ***(1) Notice by defendant***

The judge may, upon written motion of the prosecutor filed pursuant to Rule 14.2(d), stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of the defendant's intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names, addresses, dates of birth, and known contact information of the witnesses upon whom the defense intends to rely to establish the alibi.

#### ***(2) Disclosure of information and witness***

Within 7 days of service of the defendant's notice of alibi, the prosecutor shall serve upon the defendant a written notice stating the names, addresses, dates of birth, and known contact information of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

### *(3) Continuing duty to disclose*

If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision Rule 14.3(a)(1) or (2), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

### *(4) Failure to comply*

Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

### *(5) Exceptions*

For cause shown, the judge may grant an exception to any of the requirements of Rule 14.3(a)(1)-(4).

### *(6) Inadmissibility of withdrawn alibi*

Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

## **(b) Notice of Other Defenses**

If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

## **(c) Self Defense and First Aggressor**

### *(1) Notice by defendant*

If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that the alleged victim

was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses, dates of birth, and known contact information of the witnesses the defendant may call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

### *(2) Reciprocal disclosure by the prosecution*

No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the prosecutor shall serve upon the defendant a written notice of any rebuttal evidence the prosecutor may introduce, including a brief description of such evidence together with the names of the witnesses the prosecutor may call, the addresses, dates of birth, and known contact information of other than law enforcement witnesses and the business addresses of law enforcement witnesses.

### *(3) Continuing duty to disclose*

If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under Rule 14.3(c)(1) or (2), that party shall promptly notify the adverse party or its attorney of such evidence.

### *(4) Failure to comply*

Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

## Rule History

*Adopted November 26, 2024, effective March 1, 2025.*

## Reporter's Notes

### *(2025)*

*[Rule 14.3 replaces prior Rules 14(b)(1), (b)(3), and (b)(4).]*

Rule 14.3 makes no substantive changes to what was previously Rule 14(b)(1), (b)(3), and (b)(4). It groups together the discovery provisions for affirmative defenses and defense claims that may require rebuttal, other than mental health-related defenses and evidence (formerly 14(b)(2)) which are in new Rule 14.4. The rule provides for disclosure by the

defendant of the same demographic information concerning alibi witness, and by the prosecutor of witnesses to rebut the alibi, as is provided for in Rule 14(b)(1)(C) and Rule 14.1(a) (i.e., name, address, date of birth and known contact information).

## **Rule 14.4: Pretrial Discovery of Mental Health Issues**

### **(a) Notice and Filing**

#### ***(1) Notice***

If a defendant intends at trial to raise as an issue the defendant's mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

- (A) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;
- (B) the names, addresses, and known contact information of expert witnesses whom the defendant expects to call; and
- (C) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to the defendant's mental condition.

#### ***(2) Filing***

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

### **(b) Examination**

#### ***(1) Order***

If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to the defendant's mental condition will be relied upon by a defendant's expert witness, the judge, on the judge's own motion or on

motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

- (A) The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (i) the defendant then intends to offer into evidence expert testimony based on the defendant's own statements or (ii) there is a reasonable likelihood that the defendant will offer that evidence.
- (B) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.
- (C) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

## *(2) Sealing of examiner report*

Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (A) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to the defendant's mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (B) the defendant files a motion requesting that the report be made available to the parties; or (C) after the defendant expresses the clear intent to raise as an issue the defendant's mental condition, the judge is satisfied that (i) the defendant intends to testify, or (ii) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to the defendant's mental condition at the relevant time.

## *(3) Discovery of defense report*

At the time the report of the prosecution's examiner is disclosed to the parties, the defendant shall provide the prosecutor with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

## *(4) Content of reports*

The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding



the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

### *(5) Redaction of reports*

If these reports contain both privileged and nonprivileged matter, the judge may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

### *(6) Failure to comply*

If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the judge may prescribe such remedies as the judge deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

## **(c) Discovery for the Purpose of a Court-ordered Examination Under Rule 14.4(b)**

### *(1) Automatic discovery to examiner*

If the judge orders the defendant to submit to an examination under Rule 14.4(b), the defendant shall, within 14 days of the court's designation of the examiner, make available to the examiner the following:

- (A) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession;
- (B) All medical records concerning the defendant in defense counsel's possession; and
- (C) All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

### *(2) Continuing duty*

The defendant's duty of production set forth in Rule 14.4(c)(1) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

### *(3) Additional discovery requested by examiner*

#### **(A) In general**

In addition to the records provided under Rule 14.4(c)(1) and (2), the examiner may request records from any person or entity by filing with the court under seal, in such form as the court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant.

#### **(B) Notice and hearing**

Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14.4(c)(3). Within 30 days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14.4(b)(3), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the judge, in the exercise of discretion, determines that it would be unfairly prejudicial to the defendant to do so.

#### **(C) Order**

If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14.4(b)(3). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial.

### *(4) Tests and assessments*

Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the prosecution's examiner or at the request of the prosecution's examiner.

## (d) Additional Discovery

Upon a showing of necessity, the prosecutor and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

## Rule History

*Adopted November 26, 2024, effective March 1, 2025.*

## Reporter's Notes

*(2025)*

*[Rule 14.4 replaces but makes no substantive change to prior Rule 14(b)(2) (Mental Health Issues).]*

Rule 14.4 makes no substantive changes to what was previously Rule 14(b)(2). It sets forth discovery provisions applicable when the defendant raises an issue of the defendant's mental health at the time of the alleged crime or seeks to offer expert testimony on the defendant's mental condition at any stage of the proceeding. The new rule adds clarifying headings to the sections and removes references to gender.

## Rule 15: Interlocutory Appeal

(Applicable to District Court and Superior Court)

### (a) Right of Interlocutory Appeal

#### *(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted*

The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge granting a motion to dismiss a complaint or indictment or a motion for appropriate relief made pursuant to the provisions of Rule 13(c).

#### *(2) Right of Appeal Where Motion to Suppress Evidence Determined*

A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court, in the form and manner prescribed by a standing

order of that court, for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may order it to the full Supreme Judicial Court or to the Appeals Court for determination.

### *(3) Right of appeal where delinquency defendant discharged*

The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge discharging a person pursuant to G. L. c. 119, § 72A.

### *(4) Probable Cause Hearings*

No interlocutory appeal or report may be taken of matters arising out of a probable cause hearing.

## **(b) Procedural Requirements**

### *(1) Time for Filing Appeal*

An appeal under Rule 15(a)(1) shall be taken by filing a notice of appeal in the trial court within thirty days of the date of entry of the order being appealed. An application for leave to appeal under Rule 15(a)(2) shall be made by filing within thirty days of the date of entry of the order being appealed, or such additional time as either the trial judge or the single justice of the Supreme Judicial Court shall order, (a) a notice of appeal in the trial court, and (b) an application to the single justice of the Supreme Judicial Court for leave to appeal.

### *(2) Record*

The record for an interlocutory appeal shall be defined and assembled pursuant to Massachusetts Rule of Appellate Procedure 8.

### *(3) Findings*

The judge shall make all findings of fact relevant to the appeal or the application for leave to appeal within the period specified in Rule 15(b)(1) for filing the notice of appeal.

## **(c) Determination of Motions**

Any motion the determination of which may be appealed pursuant to this rule shall be decided by the judge before the defendant is placed in jeopardy under established rules of law.

## (d) Costs upon Appeal

If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, shall determine and approve the payment to the defendant of his or her costs of appeal together with reasonable attorney's fees to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

## (e) Stay of the Proceedings

If the trial court issues an order which is subject to the interlocutory procedures herein, the trial of the case shall be stayed and the defendant shall not be placed in jeopardy until interlocutory review has been waived or the period specified in Rule 15(b)(1) for instituting interlocutory procedures has expired. If an appeal is taken or an application for leave to appeal is granted, the trial shall be stayed pending the entry of a rescript from or an order of the appellate court. If an appeal or application therefor is taken by the Commonwealth, the defendant may be released on personal recognizance during the pendency of the appeal.

## Rule History

*Amended April 29, 1986, effective July 1, 1986; amended effective April 14, 1995; amended effective March 1, 1996; amended June 8, 2016, effective August 1, 2016; amended January 25, 2017, effective March 1, 2017.*

## Reporter's Notes

### (2016)

The 2016 amendments to Rule 15 respond to the Supreme Judicial Court's decision in *Commonwealth v. Jordan*, 469 Mass. 134 (2014), a case in which the Commonwealth sought interlocutory review of a suppression order through a late-filed notice of appeal and application for leave to appeal. In agreeing to consider the appeal in spite of the late filings, the Court acknowledged that the procedures governing the timeliness of such appeals lacked clarity, *id.* at 145, a problem that the Court addressed by announcing specific procedures prospectively applicable to Rule 15 filings seeking leave to appeal suppression orders. *Id.* at 147-148. In addition to this clarification of Rule 15 filing procedures, the Court expressed concern that then-Rule 15(b)(1)'s ten-day filing period for such appeals might be insufficient. *Id.* at 149-150. As discussed below, amended Rule 15 implements the procedural framework mandated in *Jordan* and expands to thirty days the time for filing a notice of appeal and an application for leave to appeal from an order determining a motion

to suppress evidence. Amended Rule 15 also includes non-substantive changes that clarify its mandate and update it to reflect current law.

## Rule 15(a)(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted

Amended Rule 15(a)(1) reflects longstanding case law, making it clear that the Appeals Court is the court to which the Commonwealth may appeal the allowance of a motion to dismiss or of a motion for appropriate relief other than to suppress evidence. See *Commonwealth v. Friend*, 393 Mass. 310, 314 (1984) (Commonwealth's appeal from allowance of a motion to dismiss must be to the Appeals Court).

## Rule 15(a)(2) Right of Appeal Where Motion to Suppress Evidence Determined

Amended Rule 15(a)(2) implements the late-filing procedures mandated by the Supreme Judicial Court in *Commonwealth v. Jordan*, 469 Mass. 134 (2014) for interlocutory appeals of an order determining a motion to suppress. Former Rule 15(a)(2) did not specify what showing an applicant for such relief must make concerning the timeliness of the necessary filings, hampering the efforts of single justices to be consistent in addressing the threshold issue of whether the notice of appeal and application for leave to appeal were timely filed and, if not, whether they should nevertheless be considered. See *Jordan*, 469 Mass. at 145 (acknowledging a "lack of clarity" in the single justices' application of procedural rules governing timeliness of Rule 15(a)(2) filings).

Amended Rule 15(a)(2) cures this deficiency, incorporating by reference the Supreme Judicial Court's standing order prescribing with specificity the form and manner for making an application to a single justice for leave to appeal a suppression order. This standing order, Supreme Judicial Court Order Regarding Applications to A Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2) (2016), in effect codifies *Jordan*'s procedural framework for addressing timeliness issues, including a requirement that an application for leave to appeal a suppression order contain an affirmative representation that the application and notice to appeal are, or are not, timely under Rule 15(b)(1). If the appeal or application is untimely, the standing order requires that the application be accompanied by a motion to enlarge time for filing, supported by an affidavit providing "in meaningful detail the reasons for the delay." See Supreme Judicial Court Order Regarding Applications to A Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), § (a)(7) (2016). See also *Commonwealth v. Jordan*, 469 Mass. 134, 147-148 (2014) (setting out 2 "Rule 15 procedure in future cases").

The purpose of this provision is to permit the single justice to whom the application is made to decide (1) whether the application satisfies Rule 15's timing requirements, and, if it does not, (2) whether the application should nevertheless be considered, before proceeding to the merits of the application and, if appropriate, the appeal. This threshold determination by the single justice is intended to be final, foreclosing further consideration of this procedural issue by the full court or the Appeals Court if the single justice refers the appeal to either for determination. See *Jordan*, 469 Mass. at 148 (2014).

## Rule 15(a)(3) Right of Appeal Where Transfer of Delinquency Proceeding is Denied

Rule 15(a)(3), permitting the Commonwealth to appeal a judge's denial of a requested transfer of a delinquency proceeding to Superior or District Court for criminal prosecution, is deleted. G. L. c. 119, § 61, which provided for such transfers, was repealed, making Rule 15(a)(3) obsolete. This section is reserved for possible amendment to reflect current law.

## Rule 15(b)(1) Time for Filing Appeal

Rule 15(b)(1), as amended, increases the time to file a notice of appeal and an application for leave to appeal a suppression order to thirty days, clarifying that the starting point for that time period is the date that the order being appealed is entered by the lower court. This filing period is meant to balance the need for adequate time to consider and prepare an application for interlocutory review of a suppression order against the potential for unnecessary, widespread delays in resolving the many criminal cases which involve suppression orders. Thirty days, the filing period applicable to other interlocutory appeals under Rule 15 and presumptively applicable to all appeals in criminal cases, see Rule 4(b), Mass. R. A. P., as amended, 431 Mass. 1601 (2000), should ordinarily suffice. However, if in a particular case a party can demonstrate with specificity that thirty days is insufficient, the rule provides for leave to seek additional time from either the trial judge or single justice. If there is a timely motion to reconsider the suppression order in question, the thirty-day time period for filing an application for interlocutory review does not commence until the trial court enters its order deciding the motion to reconsider. See *Jordan*, 469 Mass. at 147 n. 24.

The SJC's standing order incorporated in amended Rule 15(a)(2) provides that the party opposing interlocutory appeal of the suppression order may file a memorandum in opposition to that application within fourteen days after the application for leave to appeal is entered. Supreme Judicial Court Order Regarding Applications to A Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), § (c) (2016). The order further permits the single justice to extend or shorten the time to file such opposition and provides that a party

deciding not to file an opposition must serve notice of that intention within the time allowed for filing the opposition. *Id.*

## Rule 15(b)(2) Record; Rule 15(b)(3) Findings

Rule 15(b)(2) and Rule 15(b)(3) contain the provisions of former Rule 15(b)(2), renumbered to separate former Rule 15(b)(2) into two parts, Rule 15(b)(2) providing for definition and assembly of the record and Rule 15(b)(3) requiring timely findings by the trial judge.

# Rule 16: Dismissal by the Prosecution

(Applicable to District Court and Superior Court)

## (a) Entry of a Nolle Prosequi

A prosecuting attorney may enter a nolle prosequi of pending charges at any time prior to the pronouncement of sentence or the imposition of probation or the entry of an order of continuance without a finding. A nolle prosequi shall be accompanied by a written statement, signed by the prosecuting attorney, setting forth the reasons for that disposition.

## (b) Entry of a Nolle Prosequi During Trial

After jeopardy attaches, a nolle prosequi entered without the consent of the defendant shall have the effect of an acquittal of the charges contained in the nolle prosequi.

## Rule History

*Amended February 22, 2022, effective April 1, 2022.*

## Reporter's Notes

### (2022)

This amendment to Rule 16(a) clarifies when the prosecuting attorney's authority to enter a nolle prosequi of a pending case ends, based on the meaning of "sentence" required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020). The prosecuting attorney has wide and exclusive authority to enter a nolle prosequi, as a matter of both constitutional separation of powers and common law. *Commonwealth v. Cheney*, 440 Mass. 568, 574 (2003). This authority extends to any time before the pronouncement of sentence or the imposition of



probation or a continuance without a finding. *Commonwealth v. Boyd*, 474 Mass. 99, 103 (2016).

## (1979)

While similar to Fed. R. Crim. P. 48, this rule is a formalization of prior Massachusetts practice.

### Subdivision (a)

The decision to enter a nolle prosequi as to all or any distinct part of pending charges is discretionary with the prosecuting attorney.

*Power to enter a nolle prosequi is absolute in the prosecuting officer from the return of the indictment up to the beginning of trial, except possibly in instances of scandalous abuse of the authority.*

*Commonwealth v. Dascalakis*, 246 Mass. 12, 18 (1923). See *Manning v. Municipal Court of Roxbury*, Mass. Adv. Sh. (1977) 679, 682-83, *Commonwealth v. Massod*, 350 Mass. 745 (1966). This rule is consistent with the common law. See 30 Mass. Practice Series (Smith) §§ 854, 858 (1970, Supp. 1978).

Rule 48(a) of the Federal Rules of Criminal Procedure permits dismissal by the prosecution only with leave of court. It did not seem advisable to engraft this additional requirement onto the Massachusetts rule, however, since it is doubted that the court has the power to compel the Commonwealth to proceed with a case which it does not believe warrants prosecution. See 3 C. Wright, *Federal Practice and Procedure: Criminal* § 812 at 304 (1969).

The term “prosecuting attorney” in this rule is intended to include municipal attorneys, e.g., city solicitors, prosecuting a case. See G.L. c. 278, § 15.

General Laws c. 277, § 70A is the basis for the second sentence of this subdivision which requires the prosecuting attorney to file a statement of his reasons for entering a nolle prosequi. 30 Mass. Practice Series (Smith) § 857 (1970, Supp. 1978); see ABA Standards Relating to the Prosecution Function § 4.4 (Approved Draft, 1971).

### Subdivision (b)

Once a case has reached trial, the defendant has been placed in jeopardy and has the right to have the issue of his guilt adjudicated. *Commonwealth v. Massod*, 350 Mass. 745 (1966). If after commencement of trial, but before return of the verdict, the prosecuting attorney enters a nolle prosequi without the consent of the defendant, the defendant is effectually acquitted of those charges which are the subject of the nolle prosequi. *Commonwealth v. Hart*, 149 Mass. 7 (1889); *Commonwealth v. Dascalakis*, 246 Mass. 12 (1923);

Commonwealth v. Sitko, Mass. Adv. Sh. (1977) 668; 30 Mass. Practice Series (Smith) § 855 (1970). This comports substantially with Fed. R. Crim. P. 46(a), which prohibits the filing of a dismissal during trial without the consent of the defendant.

## Rule 17: Summonses for Witnesses

(Applicable to District Court and Superior Court)

### (a) Summons

#### *(1) For Attendance of Witness; Form; Issuance*

A summons shall be issued by the clerk or any person so authorized by the General Laws. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

#### *(2) For Production of Documentary Evidence and of Objects*

A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

### (b) Defendants Unable to Pay

At any time upon the written ex parte application of a defendant which shows that the presence of a named witness is necessary to an adequate defense and that the defendant is unable to pay the fees of that witness, the court shall order the issuance of an indigent's summons. The witness so summoned shall be paid in accordance with the provisions of subdivision (c) of this rule. If the court so orders, the costs incurred shall be assessed to the defendant in accordance with the General Laws or the provisions of these rules.

## (c) Payment of Witnesses

Expenses incurred by a witness summoned on behalf of a defendant determined to be indigent under this rule as well as expenses incurred by a witness summoned on behalf of the Commonwealth, as such expenses are determined in accordance with the General Laws, shall be paid after the witness certifies in a writing filed with the court the amount of his travel and attendance.

## (d) Service

### *(1) By Whom; Manner*

A summons may be served by any person authorized to serve a summons in a civil action or to serve criminal process. A summons shall be served upon a witness by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing it to the witness' last known address.

### *(2) Place of Service*

#### **(A) Within the Commonwealth**

A summons requiring the attendance of a witness at a hearing or a trial may be served at any place within the Commonwealth.

#### **(B) Outside the Commonwealth or Abroad**

A summons directed to a witness outside the Commonwealth or abroad shall issue and be served in a manner consistent with the General Laws.

### *(3) Return*

The person serving a summons pursuant to this rule shall make a return of service to the court.

## (e) Failure to Appear

If a person served with a summons pursuant to this rule fails to appear at the time and place specified therein and the court determines that such person did receive actual notice to appear, a warrant may issue to bring that person before the court.

# Rule History

*Effective July 1, 1979.*

## Reporter's Notes

(1979)

The prototype for this rule is found in Fed. R. Crim. P. 17. See Massachusetts and Federal Rule of Civil Procedure 45; Rules of Criminal Procedure (U.L.A.) rule 731 (1974). Rule 17 is for the most part in accord with prior Massachusetts law. Statutes which are consistent with this rule—e.g., G.L. c. 233, §§ 5-6, which authorize sanctions for a witness' failure to comply with a summons—are to remain in effect.

“Summons” as used in this rule (and Mass. R. Crim. P. 35[b]) is intended to refer to what has traditionally been expressed by the terms “summons” and “subpoena.”

The right of a defendant to have process issued for the attendance of necessary witnesses is founded in the Constitution:

*[I]t is the Sixth Amendment itself that in terms guarantees ‘compulsory process for obtaining witnesses in [the accused’s] favor,’ and this is paralleled in substance by article 12 of our Declaration of Rights.*

Blazo v. Superior Court, 366 Mass. 141, 145 (1974). A defendant’s right to have summonses issued on his behalf may also be grounded in the sixth amendment right of confrontation.

### Subdivision (a)

This subdivision is drawn with little change from Fed. R. Crim. P. 17(a), (c); accord Rules of Criminal Procedure (U.L.A.) rule 731(a), (c) (1974).

#### **Subdivision (a)(1)**

General Laws c. 233, § 1 provides that persons in addition to the clerk of court, i.e., notaries public and justices of the peace, may issue summonses for witnesses in criminal cases but only “upon request of the attorney general, district attorney or other person who acts in the case in behalf of the Commonwealth or of the defendant.”

The proceedings contemplated by this subdivision include depositions to perpetuate testimony pursuant to Mass. R. Crim. P. 35.

### **Subdivision (a)(2)**

The provision of this subdivision authorizing the court to order the production of evidence prior to its use at trial or in other judicial proceedings is not intended to permit the use of summonses to subvert the discovery rule, Mass. R. Crim. P. 14. Rather, it is to permit the court to avoid delay where the production of many books, papers, documents, or other objects would delay the proceedings if not ordered until their commencement.

### **Subdivision (b)**

The subdivision, loosely modeled upon Fed. R. Crim. P. 17(b), is drafted in response to the Supreme Judicial Court's decision in *Blazo v. Superior Court*, 366 Mass. 141 (1974). There the court held that when indigency and the necessity for witnesses are shown, a defendant is to have the witnesses summonsed at the expense of the Commonwealth, suggesting the following procedure:

*"[A] defendant believing himself entitled will apply to the competent judge—ex parte if the defendant should so desire—supporting his application by affidavit showing his inability to pay the fees involved, setting out the names and addresses (if known) of the persons to be summoned, and stating why their attendance is necessary to an adequate defence. The judge may require the submission of further data."*

*Id.* at 145-46 (footnote omitted). The court further explained that the reason for permitting ex parte application "is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summons his witnesses without explanation that will reach the adversary." *Id.* at 145 n. 8.

There is a significant difference between this subdivision and its counterpart under the federal rule. The summons that is to be issued under this rule is a prosecutor's summons, G.L. c. 277, § 68, and not a court summons, G.L. c. 233, § 1. This is because G.L. c. 233, § 3 provides that witnesses summonsed on behalf of the defendant are entitled to prepayment of some of their expenses. If this requirement were applicable to witnesses for indigent defendants, an added burden would be imposed on the court clerks. Therefore, witnesses for indigent defendants are to be summonsed by the Commonwealth pursuant to G.L. c. 277, §§ 68-69, and will not require prepayment. This procedure parallels that of Rules of Criminal Procedure (U.L.A.) rule 731(b) (1974). Compare Fed. R. Crim. P. 17(b), (d).

### **Subdivision (c)**

The expenses involved in securing the attendance of a witness on behalf of a defendant or the Commonwealth in a criminal proceeding consist of the fees of the officer serving the

process and fees to the witness for travel and attendance. G.L. c. 233, §§ 2-3; c. 262, §§ 8(B)(3), 29.

General Laws c. 262, § 29 requires that a witness certify in writing the amount of his travel and attendance costs and serves as a basis for this subdivision. The statute additionally provides that where the witness has been summonsed by the Commonwealth, the certificate must be accompanied by a voucher signed by the attorney general or the district attorney stating that such fees are due the witness for his attendance. This rule adds witnesses summonsed by indigent defendants to this category and provides for the payment of their expenses in the same manner as the expenses of Commonwealth witnesses are paid. Where the district attorney is prosecuting the case, G.L. c. 12, § 24 (as amended, St. 1978, c. 478, § 10) authorizes the payment of expenses of government-summonsed witnesses from Commonwealth funds. See G.L. c. 213, § 8, which the Supreme Judicial Court in *Blazo* stated would authorize county payment (now the Commonwealth, § 8 as amended, St. 1978, c. 478, § 127) of witnesses ordered to attend on behalf of an indigent defendant. *Blazo v. Superior Court*, *supra*, at 146.

Under this rule, all witnesses are to be paid established witness fees. This is a departure from prior law, G.L. c. 277, § 69, which required prosecution witnesses to attend without pay unless the court directed the payment of their fees and expenses.

### Subsection (d)

The first sentence of subdivision (d)(1) embodies the substance of Mass. R. Civ. P. 45(c), which permits service “by any person who is not a party and is not less than 18 years of age.” Compare Fed.R.Civ.P. 45(c) with Fed. R. Crim. P. 17(d). This procedure accords with that under G.L. c. 233, § 2, which provides that a summons for a witness may be served by an officer qualified to serve civil process or by some other disinterested person. Added is provision for service of summonses by persons authorized to serve criminal process. The rule would appear to allow service by counsel for the defendant or Commonwealth, although this practice has been criticized as perhaps “unwise.” 8 Mass. Practice Series (Smith & Zobel) Reporter’s Notes at 136 (1977); compare Supreme Judicial Court Rule 3:22, incorporating ABA Canons of Professional Ethics, Canon 19 (1972); ABA Code of Professional Responsibility DR 5-102, EC 5-9, 5-10 (1970).

The manner of service under this rule is for the most part consistent with procedure under prior law and the civil rules G.L. c. 233, § 2; Mass. R. Civ. P. 45(c), but adds that a summons may be served by mail. This last means of service is not available in cases of witnesses summonsed by non-indigent defendants, since tender or payment of fees to the witness is a prerequisite to compelling his attendance. G.L. c. 233, § 3.

Subdivision (d)(2)(A) is taken from the second sentence of Mass. R. Civ. P. 45(e).

General Laws c. 233, §§ 13A-13C; otherwise known as the Uniform Law to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, provides a simple solution to the problem of obtaining out-of-state witnesses to appear in criminal proceedings. As long as the subject jurisdiction has adopted the Act the court will be able to secure attendance. Notwithstanding the provisions of G.L. c. 233, §§ 13A -13C and c. 277, § 66, it has been stated that the right of a defendant to compulsory process for witnesses who are necessary to his defense does not by statute automatically extend beyond the territory of the Commonwealth. *Commonwealth v. Durring*, 354 Mass. 523 (1968). Accord *Commonwealth v. Edgerly*, Mass. App. Ct. Adv. Sh. (1978) 400.

Even though a defendant may not have the statutory right to compulsory process for necessary witnesses, the Constitution requires that the state make a good faith effort to obtain the presence of certain witnesses. In addition to the Uniform Act, state courts should avail themselves of two other avenues to secure the attendance of witnesses. The court in *Barber v. Page*, 390 U.S. 719 (1968), determined that where the defendant has a constitutional right to confront a witness, a state must seek his attendance via: (1) 28 U.S.C. § 2241(c)(5) (1971), which gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state prosecutors in the case of the prospective witnesses currently in federal custody; and (2) the issuance of a writ of habeas corpus ad testificandum by state courts. The existing policy of the United States Bureau of Prisons is to permit federal prisoners to testify in state court criminal proceedings pursuant to the issuance of such writs.

With respect to witnesses who are citizens or residents of the United States, but currently beyond its jurisdiction, the Court in *Mancusi v. Stubbs*, 408 U.S. 204 (1972), enunciated the limitations of the applicability of 28 U.S.C. § 1783 (1966), which provides in pertinent part:

*(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice \* \* \* .*

With respect to § 1783, the court stated: “We have been cited to no authority applying this section to permit subpoena by a federal court for testimony in the state felony trial, and certainly the statute on its face does not appear to be designated for that purpose.” *Id.* at 212. (Footnote omitted.)

The Mancusi court concluded that Tennessee was powerless to compel the attendance of the absent witness, then a resident of Sweden, and that, therefore, the state had not denied the respondent the right of confrontation as guaranteed by the sixth and fourteenth amendments.

## Rule 18: Presence of Defendant

(Applicable to District Court and Superior Court)

### (a) Presence of Defendant

In any prosecution for crime the defendant shall be entitled to be present at all critical stages of the proceedings.

#### *(1) Defendant Absenting Self*

If a defendant present at the beginning of a trial thereafter is absent without cause or without leave of court, the trial may proceed to a conclusion in all respects except the imposition of sentence or probation as though the defendant were still present.

#### *(2) Waiver of Presence in Misdemeanor Cases*

A person prosecuted for a misdemeanor may upon request, with leave of court, be excused from attendance if represented by counsel or an agent authorized by law and may be excused from attendance without leave of court if so authorized by the General Laws.

#### *(3) Presence Not Required*

A defendant need not be present at a revision or revocation of disposition pursuant to rule 29 or at any proceeding where evidence is not to be taken.

### (b) Presence of Corporation

A corporation may appear by a duly authorized agent for the purposes of this rule.

## Rule History

*Amended February 22, 2022, effective April 1, 2022.*



# Reporter's Notes

(2022)

This amendment makes two changes to bring the rule into conformity with current law and practice. First, it removes gendered pronouns and references in Rule 18(a)(1) and (2) and clarifies that a defendant's presence is required for imposition of any sentence or the imposition of probation. Rule 18(a)(1) allows a trial to proceed to its conclusion after a defendant is absent without cause or leave of the court but requires the defendant's presence for imposition of sentence. A defendant has a right to be present at sentencing. *Commonwealth v. Pacheco*, 477 Mass. 206, 215 (2017) (citing *Commonwealth v. Williamson*, 462 Mass. 676, 685 (2012)). This amendment clarifies that the defendant's presence is also required for imposition of probation. The amendment uses "sentence" rather than "disposition" because the defendant's presence would not be required for a dismissal.

Second, in Rule 18(a)(3) the amendment implements the terminological change from "sentence" to "disposition" required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020), to reflect more accurately that potential dispositional outcomes in criminal cases subject to a Rule 29 motion to revise and revoke may include continuances without a finding. *Id.*, 485 Mass. at 10 ("a continuance without a finding disposition may fairly be considered a sentence for the purposes of Rule 29").

(1979)

This rule is patterned primarily upon Rule 3.180 of the Florida Rules of Criminal Procedure and is a codification of accepted Massachusetts practice.

Unlike the Florida rule a defendant's presence is commanded at certain specifically enumerated "critical stages" of a criminal proceeding: arraignment, entry of plea, pretrial conference, all trial proceedings before the court, jury view, rendition of verdict, pronouncement of judgment and imposition of sentence. See Uniform Rule 713, which would grant the defendant the right to be present "at **every stage** of the trial . . . and at the disposition hearing" (emphasis supplied), and which would require his presence unless he is represented by counsel and has waived the right to be present, has voluntarily failed to be present, or has been justifiably excluded. Rules of Criminal Procedure (U.L.A.) rule 713 (1974). Rule 18 neither presumes to define those stages of a proceeding when the defendant's presence is constitutionally mandated, nor to compel his presence at every stage, rather it instructs that he is to be present at "all critical stages." The term "critical" is

unrelated to its use for other purposes, e.g., assignment of counsel, and is to be interpreted in light of relevant judicial decision.

The defendant's presence is constitutionally required during all critical stages because fairness demands that the defendant be present when his substantial rights are at stake, and those instances are not limited to the specific proceedings listed in the Florida rule. Conversely, there are matters which the court and defendant's counsel can determine in the defendant's absence; to require the defendant's presence at all times could in some instances unduly prolong the disposition of the case. Thus, under this rule, the detailing of what stages are deemed critical is left to judicial determination.

The sixth amendment to the United States Constitution guarantees a defendant the right to confront witnesses at trial, which right is also guaranteed by article 12 of the Massachusetts Declaration of Rights and by statute, G.L. c. 278, § 6. However, the primary constitutional protection is afforded by the due process clause of the fourteenth amendment. "[T]he presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence. . . ." *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934). Thus, the Constitution requires the presence of the defendant at proceedings other than trial if his presence would be essential to preserve substantial rights.

## Subdivision (a)

Where a stage of the proceedings is deemed critical, the defendant's presence is required and the court is not to proceed in his absence without determining that he has effectively waived or forfeited the right to be present. *Taylor v. United States*, 414 U.S. 17 (1973). Most hearings either before or after trial do not require the defendant's presence. See Mass. R. Crim. P. 30. For example, his presence is not required at pretrial motions, including motions for a change of venue, Mass. R. Crim. P. 37, and motions for a continuance, Mass. R. Crim. P. 10, *Commonwealth v. Robichaud*, 358 Mass. 300 (1970). And his presence is not generally required at post-trial proceedings. *Commonwealth v. Dupont*, 1 Mass. App. Ct. 566 (1974); \_\_\_\_; Mass. R. Crim. P. 30. But the defendant's presence is required at all trial proceedings (See *Commonwealth v. Robichaud*, *supra*), at arraignment (Mass. R. Crim. P. 6), when a plea is made (Mass. R. Crim. P. 12), and at sentencing (*Thompson v. United States*, 495 F.2d 1304 [1st Cir. 1974]; Mass. R. Crim. P. 28).

### **(a)(1)**

Although a defendant is entitled to be present at critical stages, he may waive or forfeit that right. *Commonwealth v. McCarthy*, 163 Mass. 458 (1895). He may waive his right to be present at the trial of a felony in either of two ways. First, he may voluntarily absent himself

from trial, in which case the trial may continue in his absence. *Commonwealth v. Flemmi*, 360 Mass. 693 (1971). Secondly, the defendant may become so obstreperous as to require his removal from court in order to preserve the orderliness of judicial proceedings. *Illinois v. Allen*, 397 U.S. 337 (1970); *Commonwealth v. Senati*, 3 Mass. App. Ct. 304 (1975); Mass. R. Crim. P. 45; See ABA Standards Relating to the Function of the Trial Judge § 6.8 (Approved Draft, 1972). However, trial cannot begin in the defendant's absence, *Diaz v. United States*, 223 U.S. 442, 455 (1912), thereby eliminating the possibility that a defendant, by voluntarily absenting himself can be deemed to have waived his right to be present at the inception of trial.

The defendant is not prohibited by this rule from waiving his right to be present at the trial of capital cases. The traditional rule enunciated in *Diaz v. United States*, *supra*, is that in capital crimes the defendant is not permitted to be tried in absentia because of the severity of the potential punishment. The rule was recently reaffirmed in *Taylor v. United States*, *supra*. However, the prohibition against waiver of the right to be present in capital cases does not exist in Rule 43 of the Federal Rules of Criminal Procedure, nor is it suggested by Rule 713 of the Uniform Rules of Criminal Procedure (U.L.A.) (1974). As the Advisory Committee Note to Federal Rule 43 recognizes, the present state of the law on this issue is not clear. As with the federal rule, this rule does not attempt to resolve this disputed issue, but leaves the matter to future judicial decisions.

**(a)(2)**

This is a restatement of G.L. c. 278, § 6. General Laws c. 274, § 1 defines felonies and misdemeanors.

**(a)(3)**

See generally the discussion of when a defendant's presence is required, *supra*.

## Subdivision (b)

Federal Rule of Criminal Procedure 43(c)(1) provides that "a corporation may appear by counsel for all purposes." It is, therefore, unnecessary for an officer of the corporation to be present at arraignment, plea, trial, or sentencing (unless individually charged) in any case, whether misdemeanor or felony. 8B J. MOORE, FEDERAL PRACTICE para. 43.02[3] (Rev. ed. 1978). Under Mass. R. Crim. P. 18, the corporation may appear for all purposes by "duly authorized agent" which does not require counsel.

# Rule 19: Trial by Jury or by the Court

(Applicable to Superior Court and jury sessions in District Court)

## (a) General

Where the defendant has the right to be tried by a jury, the defendant may waive the right to be tried by a jury, provided that the judge determines after a colloquy that such waiver is knowing and voluntary, and the defendant signs a written waiver, which shall be filed with the court. If there is more than one defendant, each must waive the right to trial by jury, unless the judge exercises discretion to sever the cases. The judge may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record.

## (b) Less Than a Full Jury

If after jeopardy attaches there is at any time during the progress of a trial less than a full jury remaining, a defendant may waive the right to be tried by a full jury, provided that the judge determines after a colloquy that such waiver is knowing and voluntary. The defendant shall sign a written waiver, which shall be filed with the court. If there is more than one defendant, each must waive the right to be tried by a full jury unless the judge exercises discretion to sever the cases.

## Rule History

*Amended July 8, 2020, effective September 1, 2020.*

## Reporter's Notes

(2020)

### Subdivision (a)

This amendment to Mass. R. Crim. P. 19(a) makes minor stylistic edits to provide consistency with amendments to Mass. R. Crim. P. 19(b) that were made to implement *Commonwealth v. Bennefield*, 482 Mass. 250 (2019).

When a defendant pleads not guilty and seeks trial by the judge instead of by a jury, there are two requirements for the valid waiver of the right to a jury trial. First, the judge must conduct an oral colloquy with the defendant to ensure that the waiver is entered knowingly and voluntarily. *Ciummei v. Commonwealth*, 378 Mass. 504, 509-10 (1979) (recommending colloquy address features of the jury's role, such as that the jury consists of community members, that defendant may participate in jurors' selection, that the jury's verdict must be unanimous, and that the jury decides guilt or innocence but that the judge alone will do

this if the jury is waived). Second, a written waiver must be signed by the defendant and filed with the court. See G.L. c. 263, § 6, G.L. c. 218, § 26A, G.L. c. 119, § 55A. While the requirement for a colloquy was imposed by the Supreme Judicial Court under its superintendence function, and the requirement for a written waiver is statutory, “[a] waiver obtained without observing both requirements is ineffective.” *Commonwealth v. Osborne*, 445 Mass. 776, 781 (2006).

In addition to these requirements, the judge must approve the waiver, and may refuse to do so for any good and sufficient reason. See *Commonwealth v. Collins*, 11 Mass. App. Ct. 126, 141 (1981) (“judge’s conclusion that certain pretrial matters which came to his attention, including statements of defense counsel, would unfairly prejudice, at least in appearance, the rights of the defendant is a ‘good and sufficient reason’”). A judge who has decided pretrial matters that involved passing on the defendant’s credibility, for example, might conclude that the court’s impartiality as a factfinder could reasonably be questioned. *Commonwealth v. Adkinson*, 442 Mass. 410, 412-416 (2004) (trial judge properly reminded defendant during colloquy waiving jury that he had denied codefendant’s motion to suppress her confession implicating defendant, and that he would use his best efforts to disregard this preliminary ruling and consider anew voluntariness of the confession at a jury-waived trial).

When a defendant pleads guilty and waives a trial by jury, by contrast, there is no requirement for a written waiver of the right to a jury trial. *Commonwealth v. Hubbard*, 457 Mass. 24, 26 (2010) (“There is no requirement that, when accepting a defendant’s tender of a guilty plea, a defendant’s waiver of the right to a trial with or without a jury be in writing.”). There remains, however, a requirement for a colloquy on the record in connection with the defendant’s tender of a guilty plea as an element of due process. *Commonwealth v. Evelyn*, 470 Mass. 765, 769 (2015) (“[T]he judge must engage the defendant in a colloquy before accepting the plea because due process requires that a guilty plea should not be accepted, and if accepted must be later set aside, unless the contemporaneous record contains an affirmative showing that the defendant’s plea was intelligently and voluntarily made.”) (Internal quotations omitted). See also, *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); Mass. R. Crim. P. 12(c)(3) and 12(d)(3).

## Subdivision (b)

This amendment to Mass. R. Crim. P. 19(b) implements *Commonwealth v. Bennefield*, 482 Mass. 250 (2019), by specifying the procedure through which a defendant may waive the right to a full jury after jeopardy has attached. The Court held in *Bennefield* that a colloquy on the record is essential to establish a valid waiver. *Id.* at 257. It referenced with approval the principles applicable to the colloquy required for a valid waiver of the right to a jury trial.

See *Ciummei v. Commonwealth*, 378 Mass. 504, 509-510 (1979). As in the earlier rule, the defendant must also file with the court a signed, written waiver of the right to a full jury. This waiver will be valid, however, only with the accompanying colloquy. *Bennefield*, id. Furthermore, the absence of a written waiver would not, by itself, be a ground for vacating a conviction. Id.

## (1979)

The right to trial by jury, which is guaranteed by art. 3, § 2, cl. 3 of the United States Constitution and the sixth amendment, is applicable to the states through the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Massachusetts Constitution, part 1, art. 12, also guarantees defendants the right to trial by jury. Further, G.L. c. 278, § 2, applicable to the Superior Court, provides that “[i]ssues of fact . . . shall . . . be tried by a jury . . . unless the person indicted or complained against elects to be tried by the court. . . .” General Laws c. 218, § 26A, inserted by St. 1978, c. 478, § 188, provides that trials in the District Court and the Boston Municipal Court “shall be by a jury of six, unless the defendant files a written waiver and consents to be tried by the court . . . .” Under prior law a juvenile defendant had no right to a trial by jury during the adjudicative phase of a delinquency proceeding. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Commonwealth v. Page*, 339 Mass. 313, 316 (1959). However, by G.L. c. 119, § 55A, inserted by St. 1978, c. 478, § 56, delinquency proceedings shall be by jury unless waived. If a juvenile appeals from an adjudication of delinquency in a jury waived session, his appeal to the jury session will be tried and determined in like manner as an appeal by an adult criminal defendant. G.L. c. 119, § 56 (as amended, St. 1978, c. 478, § 57). See *Sylvester v. Commonwealth*, 253 Mass. 244 (1925).

Subdivision (a). This subdivision is drawn from Fed. R. Crim. P. 23(a) and G.L. c. 119, § 55A; c. 218, § 26A; c. 263, § 6. The requirement that the waiver be in writing is not universal. See ABA Standards Relating to Trial by Jury, § 1.2(b) (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 511 (1974). In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Court held that a waiver of a jury trial cannot be presumed from a silent record. While *Boykin* would be satisfied by an oral waiver when the proceedings are recorded, the requirement in Massachusetts is that the waiver be written and filed with the clerk. *Commonwealth v. Hesser*, 1 Mass. App. Ct. 850 (1973) (Rescript); *Gallo v. Commonwealth*, 343 Mass. 397, 402 (1961); G.L. c. 263, § 6. The federal rule imposes this stricter requirement “to ensure a greater probability of a defendant understanding what he is doing . . . .” *Pool v. United States*, 344 F.2d 943, 945 (9th Cir. 1966). Likewise, the Massachusetts rule seeks to “avoid unnecessary controversy and to provide a procedural safeguard . . . .” *Gall v. Commonwealth*, supra.

“A waiver is . . . an intentional relinquishment or abandonment of a known right . . .” Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Waiver of a constitutional right must be “intelligent and competent.” Id. at 465. The waiver of the right to a jury trial must be “express and intelligent.” Patton v. United States, 281 U.S. 276, 312 (1930).

Subdivision (a) incorporates that portion of the federal rule which provides that a waiver of trial by jury must be approved by the court. Although a defendant is free to waive his jury trial, Patton, supra, there is no constitutional impediment to conditioning that waiver upon the consent of the trial judge. Singer v. United States 380 U.S. 24, 36 (1965) (construing Fed. R. Crim. P. 23[a]). See ABA Standards Relating to Trial by Jury § 1.2(a), comment at 32-34 (Approved Draft, 1968). The defendant in a capital case may not waive a jury trial in any event. G.L. c. 263, § 6 (as amended); Commonwealth v. O’Brien, 371 Mass. 605 (1976). Accord Commonwealth v. Marshall Mass. Adv. Sh. (1977) 1530, 1532-33.

The decision whether to waive trial by jury is properly that of the defendant after full consultation with counsel. ABA Standards Relating to the Defense Function § 5.2 (Approved Draft, 1971).

If there are multiple defendants and one desires to waive the right to trial by jury, then all must waive. United States v. Farries, 459 F.2d 1057, 1061 (3d Cir.), cert. denied, 409 U.S. 888 (1972), 410 U.S. 912 (1973). In a rare case, severance may be the best course if not all defendants choose waiver. In Farries, however, the enormous expense and serious security problems involved in a trial where the defendants and many witnesses were inmates of various federal penitentiaries was held to outweigh the interests of a defendant in severance.

Subdivision (b). This subdivision is in accord with current Massachusetts practice as stated in G.L. c. 234, § 26A. The provision authorizing the court to disallow a waiver of the right to be tried by a full jury is not inconsistent with prior law even though a similar provision does not appear in G.L. c. 234, § 26A. See Commonwealth v. Roby, 29 Mass. 496, 502 (1832). Compare United States v. Jorn, 400 U.S. 470 (1971).

## Rule 20: Trial Jurors

(Applicable to Superior Court and jury sessions in District Court)

### (a) Motion for Appropriate Relief

Either party may challenge the array by a motion for appropriate relief pursuant to Rule 13(c). A challenge to the array shall be made only on the ground that the prospective jurors were not selected or drawn according to law. Challenges to the array shall be made and

decided before any individual juror is examined unless otherwise ordered by the court. A challenge to the array shall be in writing supported by affidavit and shall specify the facts constituting the ground of the challenge. Challenges to the array shall be tried by the court and may in the discretion of the court be decided on the basis of the affidavit filed with the challenge. Upon the hearing of a challenge to the array, a witness may be examined on oath by the court and may be so examined by either party. If the challenge to the array is sustained, the court shall discharge the panel.

## **(b) Challenge for Cause**

### ***(1) Examination of Juror***

The court shall, or upon motion, the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror in a case to learn whether he is related to either party, has any interest in the case, has expressed or formed an opinion, or is sensible of any bias or prejudice. The objecting party may, with the approval of the court, introduce other competent evidence in support of the objection.

### ***(2) Examination upon Extraneous Issues***

The court shall examine or cause a juror to be examined upon issues extraneous to the case if it appears that the juror's impartiality may have been affected by the extraneous issues. The examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issues of such examination, and shall be conducted individually and outside the presence of other persons about to be called or already called as jurors.

### ***(3) Challenge of Juror***

Either party may challenge an individual prospective juror before the juror is sworn to try the case. The court may for cause shown permit a challenge to be made after the juror is sworn but before any evidence is presented. When a juror is challenged for cause, the ground of the challenge shall be stated. A challenge of a prospective juror and the statement of the grounds thereof may be made at the bench. The court shall determine the validity of each such challenge.



## (c) Peremptory Challenges

### *(1) Number of Challenges*

Upon the trial of an indictment for a crime punishable by imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case; in any other criminal case tried before a jury of twelve, each defendant shall be entitled to four peremptory challenges; and in a case tried before a jury of six, each defendant shall be entitled to two peremptory challenges. Each defendant in a trial of an indictment for a crime punishable by imprisonment for life in which additional jurors are impaneled under subdivision (d) of this rule shall be entitled to one additional peremptory challenge for each additional juror. Each defendant in a case in which several indictments or complaints are consolidated for trial shall be entitled to no more peremptory challenges than the greatest number to which he would have been entitled upon trial of any one of the indictments or complaints alone. In every criminal case the Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.

### *(2) Time of Challenge*

Peremptory challenges shall be made before the jurors are sworn and may be made after the determination that a person called to serve as a juror stands indifferent in the case.

## (d) Alternate Jurors

### *(1) Impanelling Jury with Alternative Jurors*

If a jury trial is likely to be protracted, the judge may impanel a jury of not more than sixteen members and the court shall have jurisdiction to try the case with that jury.

### *(2) Selection of Twelve Jurors*

If at the time of the final submission of the case to the jury more than twelve members of the jury who have heard the whole case are alive and not incapacitated or disqualified, the judge shall direct the clerk to place the names of all the remaining jurors except the foreman in a box and draw the names of a sufficient number to reduce the jury to twelve members. Those jurors whose names are drawn shall not be discharged, but shall be known as alternate jurors and shall be kept separate and apart from the other jurors in some convenient place, subject to the same rules and regulations as the other jurors, until the jury has agreed upon a verdict or has been otherwise discharged.

### *(3) Disabled Juror: Selection of Alternate*

If, at any time after the final submission of the case by the court to the jury but before the jury has agreed on a verdict, a juror dies, becomes ill, or is unable to perform his duty for any other cause, the judge may order him to be discharged and shall direct the clerk to place the names of all the remaining alternate jurors in a box and draw the name of an alternate who shall take the place of the discharged juror on the jury, which shall renew its deliberations with the alternate juror.

## **(e) Regulation and Separation of Jurors**

### *(1) Sequestration*

After the jurors have been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequestered.

### *(2) After Submission of the Cause*

Unless the jurors have been sequestered for the duration of the trial, the judge after the final submission of the case, may order that the jurors be permitted to separate for a definite time to be fixed by the judge and then reconvene in the courtroom before retiring for consideration of their verdict.

### *(3) After Commencement of Deliberations*

After final submission of the case to the jury and after deliberations have commenced, the judge may allow the jurors, under proper instructions, to separate for a definite time to be fixed by the judge and to reconvene in the courtroom before retiring for further deliberation of their verdict.

## **Rule History**

*Effective July 1, 1979.*

## **Reporter's Notes**

### **(1979)**

This rule is primarily a distillation of Massachusetts statutory law, G.L. c. 234, §§ 26B, 28-29; former G.L. c. 277, § 47A (St. 1978, c. 478, § 298). See e.g., Fed. R. Crim. P. 24; Fla.R.Crim.P. 3.370; ABA Standards Relating to Trial by Jury §§ 2.3-2.7 (Approved Draft,

1968); Rules of Criminal Procedure (U.L.A.) rules 511-513, 532 (1974); National Advisory Commission on Criminal Justice Standards and Goals, Courts §§ 4.13-4.14 (1973).

## Subdivision (a)

Although G.L. c. 277, § 47A, inserted by St. 1965, c. 617, § 1, abolished in terms “challenges to the array and to the manner of selection of grand or traverse jurors,” the relief formerly available thereunder remains available by a “motion to grant appropriate relief.” Despite the statutory change in nomenclature, the courts continue to refer to such motions as challenges to the array. See e.g., *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522, 535 (1975).

A motion for appropriate relief from trial by a jury allegedly not selected in accordance with law—that is, a motion for discharge of the panel—is properly made only before trial. G.L. c. 277, § 47A. *Brunson v. Commonwealth*, 369 Mass. 106 (1975); *Commonwealth v. Rodriquez*, 364 Mass. 87, 91 (1973); *Commonwealth v. Underwood*, 3 Mass. App. Ct. 522, 536 (1975). Mass. R. Crim. P. 13(c).

See ABA Standards Relating to Trial by Jury § 2.3 (Approved Draft, 1968), Rules of Criminal Procedure (U.L.A.) rule 511(d) (1974) (incorporating by reference Uniform Jury Selection and Service Act [U.L.A.] § 12 [1970]); Fed. R. Crim. P. 6(b)(1).

## Subdivision (b)

### **(b)(1)**

This subdivision is based upon the first paragraph of G.L. c. 234, § 28. See Fed. R. Crim. P. 24(a); ABA Standards Relating to Trial by Jury § 2.4 (Approved Draft, 1968); ABA Standards Relating to the Prosecution Function § 5.3(c) (Approved Draft, 1971); ABA Standards Relating to the Defense Function § 7.2(c) (Approved Draft, 1971); Rules of Criminal Procedure (U.L.A.) rule 512(b) (1974).

The purpose of G.L. c. 234, § 28 and of this rule is manifestly to determine whether prospective jurors are free from interest, bias, and prejudice in the case in which they are drawn to sit. *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 295 (1971), cert. denied, 407 U.S. 910, 914 (1972); accord *Commonwealth v. Montecalvo*, 367 Mass. 46, 50 (1975).

It has been consistently held that Federal Rule 24(a) permits the trial judge a large range of discretion in the latitude and manner of voir dire examination, subject to the essential demands of fairness. E.g., *Eastern Renovating Corp. v. Roman Catholic Bishop of Springfield*, 554 F.2d 4 (1st Cir. 1977); *United States v. Desmarais*, 531 F.2d 632, 633 (1st Cir. 1976). This comports with Massachusetts practice which has been uniformly stated to

give the trial judge broad discretion “whether to refine or improve on the subjects of . . . § 28, by going into more detail.” *Commonwealth v. Lacy*, 371 Mass. 363, 373 (1976); *Commonwealth v. Harrison*, 368 Mass. 366, 371 (1975). E.g., *Commonwealth v. Kudish*, 362 Mass. 627, 631-32 (1972). Because the trial judge has “a fair leeway in deciding how deep the probe should go, having in view the nature of the case as . . . [he] apprehends it at the start,” *Harrison*, *supra*, there is no requirement that any particular form or number of questions be asked. See e.g., *Commonwealth v. Hicks* Mass. Adv. Sh. (1979) 1; *Commonwealth v. Horton*, Mass. Adv. Sh. (1978) 2548; *Commonwealth v. McCants*, 3 Mass. App. Ct. 596, 598 (1975).

The provision of this subdivision which requires the approval of the court for the introduction of extrinsic evidence is consistent with prior practice although not statutorily mandated. *Commonwealth v. DiStasio*, 294 Mass. 273 (1936).

Prior practice was to pose the so-called “statutory questions” to the jurors as a group in non-capital cases and individually, out of the presence of other prospective jurors, in capital cases. *Commonwealth v. Ventura*, 294 Mass. 113 (1936). Because the need to interrogate each juror regarding the death penalty no longer exists, there is likewise no reason in the usual case why the statutory questions may not be asked of the jurors as a group. *Commonwealth v. Montecalvo*, 367 Mass. 46, 48-49 (1975). See *Commonwealth v. Harrison*, 368 Mass. 366, 369 n.5 (1975). Individual questioning may be commanded, however, by the facts and circumstances of the particular case. *Commonwealth v. Montecalvo* *supra* at 50 n.2. Compare subdivision (b)(2), *infra*.

Whether the questions upon voir dire are to be posed by the judge or by the parties or their attorneys is another matter fully within the discretion of the trial judge. The sole purpose of the voir dire is to provide the parties with a means of discovering grounds for challenges for cause and to enable them to intelligently exercise peremptory challenges. The procedure is subject to abuse by counsel who utilize voir dire to influence jurors, however, ABA Standards Relating to Trial by Jury, § 2.4, comment at 64 (Approved Draft, 1968), and unless carefully regulated, can consume an inordinate amount of court time. For these reasons, it is suggested that the better practice when voir dire is confined to the subjects of G.L. c. 234, § 28 is for the judge to conduct the interrogation. If further questioning is desirable, it should be by the judge upon suggestion of counsel. Compare ABA Standards, *supra* (judge is to submit such additional questions as he deems proper), and Rules of Criminal Procedure (U.L.A.) rule 512(b) (1974) (judge shall permit questioning by the parties).

### **(b)(2)**

The basis of this subdivision is found in the second paragraph of G.L. c. 234, § 28, as amended, St. 1975, c. 335. The amendment of § 28 conformed the statute to the Supreme

Court's decision in *Ham v. South Carolina*, 409 U.S. 524 (1973), which recognized that some cases present circumstances in which an impermissible threat to the fair trial guaranteed by the due process clause of the fourteenth amendment is posed when a judge refuses to question prospective jurors specifically as to racial prejudice. Ham did not announce a universally applicable rule, however, but a standard requiring assessment of the facts of each case. *Ristaino v. Ross*, 424 U.S. 589 (1976).

General Laws c. 234, § 28 is not limited by its terms to racial prejudice, but is directed at any bias which may result from

*the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons .*

...

It should perhaps be noted that “community attitudes” or “exposure to potentially prejudicial material” may be so pervasive as to suggest a motion to transfer for prejudice if recognized prior to trial. Mass. R. Crim. P. 38(b)(1).

The procedure under § 28 is in two steps. It must first appear to the satisfaction of the court that a prospective juror or jurors may not be indifferent as a result of matters extraneous to the case. It is preferable that the court be apprised of the possibility of bias by a motion that prospective jurors be interrogated as to possible prejudice, see *Commonwealth v. Lumley*, 367 Mass. 213, 216 (1975); *Commonwealth v. Rodriques*, 364 Mass. 87, 92-93 (1973), and that the motion be accompanied by an affidavit specifying the facts which defendant alleges make him subject to bias. See *Commonwealth v. Pinckney*, 365 Mass. 70 (1974). In *Commonwealth v. Harrison*, 2 Mass. App. Ct. 775 (1975), affirmed, 368 Mass. 366 (1975), the court found inadequate an affidavit which “amounted to no more than an argument of law intended to persuade the court to adopt the defendant’s position on the utility of the requested questions and in no way informed the judge as to the possible injection into the case of prejudice stemming from possibly disparate political views or cultural values.” *Id.* at 779. Accord *Commonwealth v. Pinckney*, *supra*. See *Commonwealth v. Peters*, Mass. Adv. Sh. (1977) 684, 689 (“absence of even minimal substantiation”).

If the court finds that there is a basis to the allegations, “the court **shall**, or the parties or their attorneys may . . . examine the juror specifically” as to the extraneous issues. G.L. c. 234 Mass. § 28 (emphasis added). Under prior case law, and pursuant to § 28 previous to its 1975 amendment, this specific examination was discretionary even if impaired indifference were shown.

Both under this subdivision and G.L. c. 234, § 28 the questioning of each venireman as to extraneous issues is to be conducted out of the presence of those not yet or already called.

### **(b)(3)**

The time for challenge of prospective juror is generally considered to end once the jury is impanelled. *Commonwealth v. Galvin*, 323 Mass. 205 (1948). It has been held, however, that the right of a judge to dismiss a juror for cause and to provide for the selection of another juror in his place continues even after the jury is impanelled but before the trial actually starts. *Commonwealth v. Monahan* 349 Mass. 139 (1965); 30 Mass. Practice Series (Smith) § 1047 (1970, Supp. 1978). See ABA Standards Relating to Trial by Jury § 2.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 512(d) (1974).

### **Subdivision (c)**

The substance of subdivision (c)(1) is taken from G.L. c. 234, § 29. See Superior Court Rule 6 (1974); ABA Standards Relating to Trial by Jury § 2.6 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 512(d) (1974).

“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.” *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Therefore, it had been held that a claim of denial of trial by an impartial jury based on the fact that the Commonwealth utilizes its peremptory challenges to exclude a particular sex or race from the panel must fail. *Commonwealth v. Mitchell*, 367 Mass. 419, 420 (1975). However, in *Commonwealth v. Soares*, Mass. Adv. Sh. (1979) 593, decided under article 12 of the Declaration of Rights rather than the equal protection clause of the fourteenth amendment, the Supreme Judicial Court held that the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community is proscribed. *Id.* at 624-25.

*[The] exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual’s membership in the group, contravenes the requirement [of the jury drawn from a representative cross-section of the community] inherent in art. 12 of the Declaration of Rights. In so holding, we recognize that no defendant is entitled to a petit jury proportionally representing every group in the community; nor are members of particular groups insulated from the proper use of peremptory challenges to exclude any individual on any other ground. What both parties are constitutionally entitled to expect is “a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.*

Id. at 627, quoting *People v. Wheeler*, 22 Cal.3d 258, 277 (1978).

While the proper use of peremptory challenges may be presumed, that presumption is rebuttable by either party on a showing that: 1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and 2) there is a likelihood that they are being excluded from the jury solely by reason of their group membership. Id. at 628-29.

*If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges. Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew.*

Id. at 631-32, quoting *People v. Wheeler*, *supra*, at 282.

Subdivision (c)(2) is borrowed almost entirely from G.L. c. 234, § 29.

It should be noted that no irregularity in a writ of venire facias or in the drawing, summoning, returning, or impanelling of jurors is sufficient to set aside a verdict unless the objecting party has been “injured” by the irregularity and unless the objection is made before verdict. G.L. c. 234, § 32. *Commonwealth v. Montecalvo*, 367 Mass. 46, 51 (1975); *Commonwealth v. McKay*, 363 Mass. 220, 223-24 (1973).

## Subdivision (d)

This subdivision parallels G.L. c. 234, § 26B (as amended). Compare Rules of Criminal Procedure (U.L.A.) rule 511(c) (1974), which provides for “additional” jurors, with ABA Standards Relating to Trial by Jury § 2.7. (Approved Draft, 1968), which has provisions for both “alternate” and “additional” jurors. Under an alternate juror system, one or more persons specifically identified as alternates are chosen in advance of trial and will be designated to take the place of a juror who is discharged prior to the time the jury retires, or in some jurisdictions, prior to verdict. ABA Standards, *supra*, comment at 79. See Fed. R. Crim. P. 24(c). Massachusetts employs the additional juror system, G.L. c. 234, § 26B, approved in Uniform Rule 511(c), *supra*, and preferred by the ABA Standards, *supra*, comment at 80.

Subdivision (d)(3) adopts a procedure contained in Cal. Penal Code § 1089 (Deering, 1971). This practice has been rejected, however, by the ABA Standards, *supra*, comment at 82, and in the 1975 amendments to the Federal Rules of Criminal Procedure.

## Subdivision (e)

### **(e)(1)**

This subdivision reiterates prior Massachusetts practice in leaving the decision whether to sequester the jury in the discretion of the trial judge. 30 Mass. Practice Series (Smith) § 1042 (1970); *Commonwealth v. Marshall*, Mass. Adv. Sh. (1977) 1530.

### **(e)(2)-(3)**

Drawn in part from Fla.R.Crim.P. 3.370 (1975), these subdivisions represent a significant departure from prior Massachusetts practice. In cases where sequestration is unnecessary, forcing the jury to remain in a body after submission of the case or the beginning of deliberations may cause hardship to jurors or their families which is not, in balance, necessary for protection of the defendant's interests, nor justified by the interests of justice. See *Commonwealth v. Watkins*, Mass. Adv. Sh. (1978) 1646, 1673-74 (defendant's motion to excuse jury from further deliberation for the evening within the discretion of judge).

# Rule 21: Sequestration of Witnesses

(Applicable to District Court and Superior Court)

Upon his own motion or the motion of either party, the judge may, prior to or during the examination of a witness, order any witness or witnesses other than the defendant to be excluded from the courtroom.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

### **(1979)**

This rule is based upon former G.L. c. 276, § 39 (Rev.St. [1836] c. 135, § 14) which was applicable to the District Court.

The power of a judge to control the progress and, within the limits of the adversary system, the shape of a trial, is universally held to include the broad discretionary power to



sequester witnesses before, during, and after their testimony. *Geders v. United States*, 425 U.S. 80 (1976); *Holder v. United States*, 150 U.S. 91, 92 (1893); *United States v. Robinson*, 502 F.2d 894 (7th Cir. 1974); *United States v. Eastwood*, 489 F.2d 818, 821 (5th Cir. 1973); *Commonwealth v. Dougan*, Mass. Adv. Sh. (1979) 380, 400; *Commonwealth v. Watkins*, Mass. Adv. Sh. (1977) 2626, 2627-28; *Commonwealth v. Vanderpool*, 367 Mass. 743 (1975); *Commonwealth v. Blackburn*, 354 Mass. 200 (1968); *Commonwealth v. Follansbee*, 155 Mass. 274 (1892); *Commonwealth v. Parry*, 1 Mass. App. Ct. 730, 736 (1974).

Although sequestration may be well used to prevent the occurrence of perjury, it serves an equally important function in preventing one witness' testimony from being inadvertently molded by the testimony of other witnesses. "The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony . . . ." 6 J. Wigmore, *Evidence* § 1838 at 461 (Chadbourn rev. 1976). It additionally aids in detecting testimony which is less than candid, see WIGMORE, *supra*, and prevents improper attempts during recess to influence the witness' testimony in light of that already given. *Geders v. United States*, *supra*, at 87.

Since the sequestration of witnesses is within the discretion of the judge, the judge may order that only some of the witnesses be removed from the courtroom or kept separated. In *Commonwealth v. Therrien*, 359 Mass. 500 (1971), it was held proper for the trial judge to except from a general order of sequestration one witness deemed "essential to the management of the case." *Id.* at 508.

In conformity with prior practice, the court is to have discretionary power to exclude the testimony of a witness who remains in court in violation of a court order. In *Commonwealth v. Crowley*, 168 Mass. 121 (1897), a witness called by the defendant to impeach the testimony of a prosecution witness was not allowed to testify because he had remained in court in violation of a court order. Although at the time of the court order the defense had not intended to use that witness at trial, the exclusion of his testimony was upheld because during the progress of the trial it became apparent that he might be called for impeachment purposes. Conversely, the court may receive the testimony of a witness who is present at trial in violation of a sequestration order. *Commonwealth v. Shagoury*, Mass. App. Ct. Adv. Sh. (1978) 927; *Commonwealth v. Hall*, 86 Mass. (4 Allen) 305, 306 (1862). In addition, a trial judge may revoke or modify a previous sequestration order. *Commonwealth v. Parry*, 1 Mass. App. Ct. 730, 736 (1974).

The rule by its terms is inapplicable to a defendant. A sequestration order would affect a defendant quite differently from the way it affects a non-party witness, because of the defendant's need to consult with counsel. *Geders v. United States*, *supra* at 88.

In addition, the defendant as a matter of right can be and usually is present for all testimony, e.g., Mass. R. Crim. P. 18, unless removed for disruptive behavior, Mass. R. Crim. P. 45.

## Rule 22: Objections

(Applicable to Superior Court and jury sessions in District Court)

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

If a party objects to a ruling or order of the court, he may state the precise legal grounds of his objection, but he shall not argue or further discuss such grounds unless the court calls upon him for such argument or discussion.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

*(1979)*

Rule 22 restates Rule 51 of the Federal Rules of Criminal Procedure and is substantially similar to Rule 46 of both the Massachusetts and Federal Rules of Civil Procedure. See Superior Court Rule 8 (1974).

For generations of Massachusetts practitioners the relationship between the saving of an exception and the right of review was so firmly established in the appellate procedure of the Commonwealth and so universally understood and applied that discussion of the validity of the requirement was foreclosed. See e.g., *Commonwealth v. Underwood*, 358 Mass. 506, 509 (1970); SUPERIOR COURT RULES, 1974, ANNOTATED, 281-82 (Mass. Bar ed. 1975). The proper saving of an exception was the first and fundamental step to secure a review by bill of exceptions or by appeal, *Commonwealth v. Underwood*, supra; *Commonwealth v. Dinnal*, 366 Mass. 165 (1974), and the failure to seasonably except vitiated the right to review of the issue to which exception was not taken, *Commonwealth v. Boudreau*, 362 Mass. 378 (1972), save for the rare instance when an appellate court would

review such questions because of a “substantial risk of a miscarriage of justice.” *Commonwealth v. Freeman*, 352 Mass. 556, 564 (1967); *Commonwealth v. Williams*, Mass. App. Ct. Adv. Sh. (1979) 253 (Rescript); *Commonwealth v. Harris*, 371 Mass. 462, 471 (1976); *Commonwealth v. Fields*, 371 Mass. 274, 277 (1976).

It is felt that the requirement of exceptions exalts form over substance in an unnecessarily ritualistic and time-consuming procedure. The draftsmen of Mass. R. Civ. P. 46 followed the lead of both the federal civil and criminal rules in abolishing the exception. This rule eliminates the requirement from criminal trials. That decision is premised upon the practical observation that an objection by counsel or counsel’s request for specific action is sufficient to indicate to the court counsel’s position on any issue and that to additionally require an exception is superfluous. See Rules of Criminal Procedure (U.L.A.) rule 755 (1974).

It has been argued that the requirement of an exception should be retained to provide the trial judge with an opportunity to reconsider his ruling on an objection and to eliminate specious arguments by counsel. *Commonwealth v. Foley*, 358 Mass. 233 (1970). Realistically, however, the taking of an exception apprises the judge of nothing which is apt to affect his initial ruling, nor does the requirement of an exception in any way compel counsel to take exception only to rulings on substantial matters.

The practice of requiring exceptions had led appellate courts to scrutinize records so as to determine whether holding that a defendant had waived objections by his failure to save exceptions could result in a miscarriage of justice. The scope of such review equates with that if no exceptions were required. See e.g., *Commonwealth v. Williams*, Mass. App. Ct. Adv. Sh. (1979) 253 (Rescript). Further, rigidly requiring that exceptions be saved led to “anomalous” results. In *Commonwealth v. Nelson*, Mass. App. Ct. 90, 101 (1975), the court reviewed the denial of a motion for a new trial to which denial no exception was taken because the appellant’s co-defendant had properly saved an exception to a similarly-grounded motion.

Superior Court Rule 8 (1974) provides that in criminal cases, objections to evidence shall be decided without argument unless the presiding justice calls upon the parties to state the grounds on which the evidence is offered or objected to.

Having once stated the grounds, if so requested, counsel is not to further comment thereon unless the court requires elucidation. See Fed.R.Evid. 103(a). It is the intent of this rule that if a statement of grounds is requested, the court may allow such statement to be made in open court or at the bench and out of hearing of the jury. See Fed.R.Evid. 103(c).

# Rule 23: Stipulations

## (a) Essential Elements

Any stipulation to an essential element of a charged offense entered by the parties before or during trial shall be in writing and signed by the prosecutor, the defendant, and defense counsel. Any such stipulation shall be read to the jury before the close of the Commonwealth's case and may be introduced into evidence.

## (b) Other Stipulations

Any other stipulation shall be placed on the record before the close of evidence and may be read or otherwise communicated to the jury or introduced into evidence in the discretion of the court.

## Rule History

*Added April 29, 2015, effective July 1, 2015.*

## Reporter's Notes

### (2015)

Rule 23 is intended to fill a gap in the Rules of Criminal Procedure identified by the Supreme Judicial Court in *Commonwealth v. Ortiz*, 466 Mass. 475 (2013). The rule provides for the manner in which stipulations of fact agreed to by the parties before or during trial are to be memorialized and used at trial. Rule 11 governs stipulations of fact agreed to at the pretrial conference, but prior to Rule 23 there were no rules that applied to such stipulations reached after the filing of the pretrial conference report at the pretrial hearing. Rule 23 remedies that deficiency, supplementing Rule 11's provisions concerning stipulations of fact.

### Rule 23(a) Essential Elements

Rule 23(a) is modeled on Rule 11 in its treatment of stipulations of fact, but its coverage is narrower. Rule 11(a)(2)(A) requires that the pretrial conference report include "any stipulations of fact" agreed to by the parties at the pretrial conference and further provides that the report be "subscribed by the prosecuting attorney and counsel for the defendant, and . . . when the report contains stipulations as to material facts, by the defendant." Rule 11(a)(2)(A) requires the parties to file the pretrial conference report with the clerk of court

and provides that agreements contained in the report, including stipulations, “shall be binding on the parties and shall control the subsequent course of the proceeding.” These requirements for binding stipulations of fact are consistent with such rules of other states. See, e.g., Ark. R. Cr. P. 20.4, Pretrial Conference; Vt. R. Cr. P. 17.1, Pretrial Conference; Ia. R. Cr. P. 2.16, Pretrial Conference; Haw. R. Cr. P. 17.1, Pretrial Conference.

Unlike Rule 11, Rule 23(a) is limited to stipulations to “an essential element of a charged offense,” that is, a fact that the Commonwealth must prove beyond a reasonable doubt in order to secure a conviction. To take a common example, in a trial for operating a motor vehicle while under influence of intoxicating liquor, G.L. c. 90, § 24(1)(a)(1), the Commonwealth must prove three elements, one of which is “that the defendant operated a motor vehicle.” *Commonwealth v. Cabral*, 77 Mass. App. Ct. 909, 909, rev. denied, 458 Mass. 1107 (2010). See Criminal Model Jury Instruction for Use in the District Court 5.310, *Operating Under the Influence of Intoxicating Liquor* (2013). If the parties stipulate to such operation, the Commonwealth’s burden of production for that element is satisfied, foreclosing the need for further proof in that regard. See *Commonwealth v. Ortiz*, 466 Mass. 475, 481 (2013). Rule 23(a) thus requires that a stipulation subject to its coverage be memorialized, that the defendant formally express his or her agreement to the stipulation, and that it be made a matter of record. Moreover, because the stipulated fact constitutes sufficient evidence, maybe the only evidence, of the element in question, the rule requires that the stipulation be read to the jury before the prosecution rests, affording the judge the discretion to decide whether it should further be entered into evidence and given to the jury as an exhibit. The model jury instructions for the charged crime set out its constituent elements, providing a ready reference for the facts subject to Rule 23(a).

Although a stipulated element under Rule 23(a) relieves the Commonwealth of its burden of producing evidence to prove that element, *Ortiz*, 466 Mass. at 481, it is distinct from a so-called stipulated trial, in which a defendant stipulates to all of the facts conclusive of guilt in order to preserve his or her right to appeal the judge’s rulings on one or more pretrial issues. See, e.g., *Commonwealth v. Brown*, 55 Mass. App. Ct. 440 (2002). Because a stipulated trial is tantamount to a guilty plea, the defendant is entitled to the safeguards applicable in a guilty plea or admission to sufficient facts, informing him or her of the consequences of the stipulation and providing a hearing to ensure that the stipulation was entered into knowingly and voluntarily. *Id.* at 448-449. See Rule 12. In contrast, a stipulated element under Rule 23(a) occurs in the context of a contested trial, and it represents a considered, tactical decision by the defendant and defense counsel which is a part of the defendant’s litigation strategy. In the ordinary case, Rule 23(a)’s requirement, following that of Rule 11(a)(2)(A), that the stipulation be written and signed by the defendant should adequately demonstrate that the defendant understands and agrees with the decision to

stipulate. Requiring in addition a colloquy such as that required for a guilty plea or an admission to sufficient facts seems unnecessary. Cf. *Commonwealth v. Ramsey*, 466 Mass. 489, 496 n. 8 (2013) (observing that plea colloquies required for stipulated trials had no application to a defendant's trial concession, as part of a litigation strategy, that he possessed crack and powder cocaine). Of course, if the judge thinks it appropriate in the circumstances of a particular case to inquire, on the record out of the presence of the jury, in order to make the record clear that the defendant understands the evidentiary consequences of the stipulation and/or that the defendant's agreement to the stipulation is voluntary, the judge has the discretion to do so. See, e.g., *Commonwealth v. Walorz*, 79 Mass. App. Ct. 132, 135-36, rev. denied, 460 Mass. 1103 (2011) (noting trial judge's detailed explanation to defendant of the effect of a stipulation to two elements of the charged offense in holding that a colloquy was not required).

A stipulated element subject to Rule 23(a) is also distinct from a defendant's concession that an essential element will be proved or that he or she is guilty of a lesser included offense. Unlike a stipulation of fact agreed to by the parties, the Commonwealth is not a participant in a defendant's strategic decision to concede that the evidence is sufficient to satisfy a portion of the charged offense. Nor does such a concession relieve the Commonwealth of its burden to prove every element of the charged offense beyond a reasonable doubt. See *Commonwealth v. Charles*, 456 Mass. 378, 383 (2010) (in a narcotics case, defense counsel's concession in opening and closing that defendant possessed "drugs" neither amounted to a tacit stipulation of that fact nor relieved the Commonwealth of its burden to prove each element beyond a reasonable doubt). Rather, a defendant's concession that some part of the Commonwealth's case is beyond dispute is a recognized trial tactic that, like other defense tactics, ordinarily requires no confirmation that the defendant understands its risks and agrees with its employment. The Supreme Judicial Court accordingly has declined to exercise its supervisory authority to require a colloquy to confirm that a defendant understands, and agrees with, a trial concession that he is guilty of a lesser included offense, deferring instead to the sound discretion of the trial judge concerning the need for any such inquiry. See *Commonwealth v. Evelyn*, 470 Mass. 765, 770-771 (2015). Similarly, Rule 23, including Rule 23(a)'s requirement of a signed writing, does not apply to a defendant's concession of some fact, element, or guilt of a lesser included offense.

## Rule 23(b) Other Stipulations

The purpose of limiting Rule 23(a) to facts constituting an essential element of a charged offense is to avoid requiring a formal writing, subscribed by counsel and the defendant, to the variety of other factual stipulations that have long been a non-problematic part of

criminal trials. Those stipulations are treated by the less formal provisions of Rule 23(b), which applies to stipulations during trial to evidentiary facts, such as those necessary to authenticate a document or to qualify a witness as an expert, and to facts that, while material, are not sufficient to prove an essential element of a charged offense. For example, in the above-hypothesized trial for operating under the influence, the fact that the defendant had told the police that he was driving a car at the time in question would certainly be material in determining whether he had operated a motor vehicle. However, standing alone, that confession would not be sufficient to prove the element of operation, see *Commonwealth v. Leonard*, 401 Mass. 470, 473 (1988), and the parties' stipulation that the defendant had so confessed would not be subject to Rule 23(a)'s requirements. Such stipulations of evidentiary and material facts have long been utilized to expedite trials where—in the judgment of the parties—nothing would be gained by insisting on a formal mode of proof. Requiring a subscribed, written stipulation in such circumstances would undercut its utility without any apparent gain. Rule 23(b) does not require that stipulations subject to its coverage be written, mandating only that they be placed on the record before the close of evidence. The rule leaves it to the judge to decide how that is done and, for stipulations of a material fact, how the stipulation should be communicated to the jury. Nothing in the rule prohibits a judge, as a matter of discretion, from requiring that a particular stipulation of fact be reduced to writing, whether because of its complexity or for any other good cause.

## **Rule 24: Opening Statements; Arguments; Instructions to Jury**

(Applicable to Superior Court and jury sessions in District Court)

### **(a) Opening and Closing Statements; Arguments**

#### ***(1) Order of Presentation***

The Commonwealth shall present its opening statement first. The defendant may present an opening statement of his defense after the opening statement of the Commonwealth or after the close of the Commonwealth's evidence. The defendant shall present his closing argument first.

## *(2) Time Limitation*

Counsel for each party shall be allowed fifteen minutes for an opening statement and thirty minutes for argument; but before the opening or the argument commences, the judge, on motion or sua sponte, may reasonably reduce or extend the time.

## **(b) Instructions to Jury; Objection**

At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the judge instruct the jury on the law as set forth in the requests. The judge shall inform counsel of his proposed action upon requests prior to their arguments to the jury. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection. Upon request, reasonable time shall be given to each party to object to the charge before the jury retires. Where either party wishes to object to the charge or to request additional instructions, the objection or the request shall be made out of the hearing of the jury, or where appropriate, out of the presence of the jury.

## **Rule History**

*Effective July 1, 1979.*

## **Reporter's Notes**

### ***(1979)***

The language of this rule substantially parallels that of Mass. R. Civ. P. 51. See National Advisory Commission on Criminal Justice Standards and Goals, Courts, standard 4.15 (1973).

### **Subdivision (a)**

Drawn from Rules of Criminal Procedure (U.L.A.) rule 521 (1974), this subdivision (a)(1) establishes the order of presentation of opening statements and closing arguments.

The fifteen-minute limitation on opening statements and thirty-minute limitation on arguments of subdivision (a)(2) are carried over from earlier rules of court. Superior Court Rules 7, 68 (1974); Supreme Judicial Court rule 2:48 (1967: 351 Mass. 768). It is intended that under this rule only one attorney for each side is to participate, contrary to the provisions of Mass. R. Civ. P. 51 and Supreme Judicial Court Rule 2:48.



While placing time limits upon opening statements and arguments, and limiting arguments to a single counsel, Rule 24 does not otherwise affect their respective functions.

*The proper function of an opening is to outline in a general way the nature of the case which counsel expects to be able to prove or support by evidence. He should not be allowed to state facts which are irrelevant or for any reason plainly incompetent.*

Posell v. Herscovitz, 237 Mass. 513, 514 (1921); see Commonwealth v. Clark, 292 Mass. 409, 410 (1935); Commonwealth v. LePage, 352 Mass. 403, 409 (1967). The refusal by counsel to confine his opening statement within the established boundaries constitutes unprofessional conduct, S.J.C. rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer, PF 11, DF 12 (February 14, 1979), and may amount to such misconduct as to warrant his expulsion from the courtroom and subjection to disciplinary proceedings. United States v. Dinitz, 424 U.S. 600 (1976).

*An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.*

*A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct.*

United States v. Dinitz, *supra*, Burger, C.J. concurring at 612. See Commonwealth v. Fazio, Mass. Adv. Sh. (1978) 1617; ABA Standards Relating to the Prosecution Function § 5.5 (Approved Draft, 1971); ABA Standards Relating to the Defense Function § 7.4 (Approved Draft, 1971).

Although Massachusetts practice permits counsel “great latitude” in closing argument, Commonwealth v. Pettie, 363 Mass. 836, 840 (1973),

*[i]t is the duty of a judge sitting with a jury to guard against improper arguments. . . . Whether he shall do this by stopping counsel in the course of such an argument, by instructing the jury to disregard such an argument, or by combining both methods, rests largely in the discretion of the judge.*

Commonwealth v. Witschi, 301 Mass. 459, 462 (1938). Accord Commonwealth v. Montecalvo, 367 Mass. 46, 56 (1975). See Commonwealth v. Earltop, Mass. Adv. Sh. (1977) 532, 539 (Hennessey, C.J., concurring) and cases cited: ABA Standards Relating to the Function of the Trial Judge § 5.10 (Approved Draft, 1972).

Where counsel “repeatedly and deliberately sail[s] unnecessarily close to the wind . . . beyond permissible limits,” Commonwealth v. Redmond, 370 Mass. 591, 597 (1976), thus bringing unsworn testimony to the attention of the jury, the cumulative prejudice may be such that curative instructions are insufficient. The remedy in such instance is an order for a new trial. Commonwealth v. Redmond, *supra*. Further, where counsel misstates the law, a request for a curative instruction is denied, and the judge’s general instruction that arguments are not evidence to be weighed by the jury is insufficient to allay the resulting prejudice, a new trial is required. Commonwealth v. Killelea, 370 Mass. 638 (1976). Because of these serious consequences, it is obvious that overreaching in argument—as in openings—may constitute unprofessional conduct. S.J.C. Rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer, PF 13, PF 14 (February 14, 1979).

## Subdivision (b)

The incorporation of the civil practice form of requests for and objection to instructions into criminal practice is felt to be appropriate because the same basic principles apply to both types of proceedings. Compare Fed. R. Crim. P. 30 with Fed.R.Civ.P. 51. Subdivision (b) adopts what had been a long-standing practice before its formalization as a rule of the Superior Court. SUPERIOR COURT RULES, 1974, ANNOTATED 290-91 (Mass.Bar Ed. 1975); see e.g., Commonwealth v. Boutwell, 162 Mass. 230 (1894); Commonwealth v. Hassan, 235 Mass. 26, 31 (1920).20).

The rule differs from Mass. R. Civ. P. 51 in requiring that objections to the charge or requests for additional instructions be made out of the hearing or presence of the jury in all cases. This comports with Rules of Criminal Procedure (U.L.A.) rule 523(b) (1974) and ABA Standards Relating to Trial by Jury § 4.6(c) (Approved Draft, 1968). See Fed. R. Crim. P. 30.

# Rule 25: Motion Required for Finding of Not Guilty

(Applicable to District Court and Superior Court)

## (a) Entry by Court

The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right.

## (b) Jury Trials

### *(1) Reservation of Decision on Motion*

If a motion for a required finding of not guilty is made at the close of all the evidence, the judge may reserve decision on the motion, submit the case to the jury, and decide the motion before the jury returns a verdict, after the jury returns a verdict of guilty, or after the jury is discharged without having returned a verdict.

### *(2) Motion After Discharge of Jury*

If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

## (c) Appeal

### *(1) Right of Appeal Where Motion for Relief Under Subdivision (b) Is Allowed After a Jury Verdict of Guilty*

The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

## *(2) Costs Upon Appeal*

If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, may determine and approve the payment to the defendant of his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

## Rule History

*Amended April 6, 1983, effective July 1, 1983; amended effective April 14, 1995.*

## Reporter's Notes

**Note:** *The Reporter's Notes are reproduced in connection with the April 1995 amendments to Rules 30(c)(8) and 30(c)(9).*

Rule 25 is derived with a minimum of change from former G.L. c. 278, § 11 (St. 1964, c. 108, §§ 1, 2) and conforms in substance to Fed. R. Crim. P. 29. See ABA Standards Relating to Trial by Jury § 4.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 522 (1974); Vt.R.Crim.P. 29; Me.R.Crim.P. 29.

The practical effect of this rule is to abolish the common law motion for a directed verdict and to substitute therefor a motion for a required finding of not guilty. This is essentially a change in terminology and does not presume to alter practice as it has developed relative to the directed verdict. The new term is not unknown in Massachusetts practice. See e.g., *Commonwealth v. Coyne*, Mass. Adv. Sh. (1977) 1062, 1068.

Motion for findings of not guilty are a part of Massachusetts practice in the context of nonjury cases, see e.g., *Commonwealth v. Pursley*, 2 Mass. App. Ct. 910 (1975) (Rescript), and are extended by this rule to include jury trials in recognition of the fact that juries have no proper function in this area. See ABA Standards Relating to Trial by Jury § 4.5(a), comment at 106-08 (Approved Draft, 1968).

### *Subdivision (a)*

The requirement that the court rule on a defendant's motion made at the close of the Commonwealth's case at the time such motion is made has recently been added to Massachusetts procedure. See *Commonwealth v. Kelley*, 370 Mass. 147, 149-50 (1976). This rule adopts this approach because of the difference between such a motion and a motion made at the close of all the evidence: in either case a defendant is requesting a judgment on the basis of evidence then before the court, but that evidence is very different

at each of the two stages of trial. See ABA Standards Relating to Trial by Jury § 4.5(b), comment at 108 (Approved Draft, 1968).

On a defendant's motion for a directed verdict at the close of the Commonwealth's case, the defendant's rights become "fixed." If this motion is improperly denied on the basis of the condition of the case when the motion was made, the defendant is entitled to a reversal of the judgment, notwithstanding the introduction of further evidence. Of course, the Commonwealth's proof might deteriorate between the time the Commonwealth rests and the close of all the evidence. In such a case, on renewal of his motion, the defendant's rights would be reappraised in consideration of all the evidence. *Commonwealth v. Kelley*, supra, at n.1; *Commonwealth v. Blow*, 370 Mass. 401, 407 n.4 (1976); *Commonwealth v. Aguiar*, 370 Mass. 490, 498 (1976).

Under this rule the defendant may offer evidence in his defense without having reserved that right. Fairness requires this result. As the court stated in *Jackson v. United States*, 250 F.2d 897 (5th Cir. 1958), the motion "would be a futile thing if the court could reserve its ruling and force the defendant to an election between resting and being deprived of the benefit of his motion," *Id.* at 901, because the defendant would be compelled to forfeit either his right to move for acquittal or his right to present evidence in his defense.

### *Subdivision (b)(1)*

This subdivision permits the court to reserve a decision on a motion made at the close of all the evidence. The objection stated in the *Jackson* case, supra, is not present in this situation, and G.L. c. 278, § 11 in fact expressly condoned the propriety of what often is referred to as a judgment notwithstanding the verdict.

### *Subdivision (b)(2)*

By giving the court the power to enter a finding of guilty of any lesser included offense or, in the language of G.L. c. 278, § 33E, a lesser degree of guilt, after a verdict of guilty, this rule deviates sharply from prior criminal practice under G.L. c. 278, § 11. *Commonwealth v. Jones*, 366 Mass. 805 (1975). This has the practical effect of extending to the trial courts, post-verdict, a power in all cases much like that which had previously been reserved to the Supreme Judicial Court in capital cases under G.L. c. 278, § 33E (as amended). This increases the options available to the trial judge after verdict. It is anticipated that through this extension greater judicial economy will result where the evidence will not support the charge, but where the weight of the evidence clearly requires the conviction of a lesser included offense. See *Jones*, supra.

It should be noted that the motion for a new trial which may be made under this subdivision is in addition to those rights which a defendant has under Rule 30(b). Obviously the court should order a new trial pursuant to this rule only upon motion of a defendant since otherwise the subsequent proceeding would be subject to constitutional attack on double jeopardy grounds.

## Rule 26: Requests for Rulings

(Applicable to jury waived trials in District Court and Superior Court)

Requests for rulings in the trial of a case shall be in writing and shall be presented to the court before the beginning of closing arguments, unless consent of the court is given to present requests later.

### Rule History

*Effective July 1, 1979.*

### Reporter's Notes

*(1979)*

Provisions comparable to Rule 26 are found in Fed. R. Crim. P. 23(c) and Rules of Criminal Procedure (U.L.A.) Rule 511(e) (1974). In addition, this rule reflects existing practice under District Court Rule 27 (1972) and Superior Court Rule 70 (1974), which deal with requests for rulings of law in non-jury trials. This rule is intended to secure for the purpose of review a separation of law from fact in cases where the trial judge acts both as factfinder and applier of law. See *Caleb Pierce, Inc. v. Commonwealth*, 354 Mass. 306 (1968).

Although much of the case law concerning requests for rulings has arisen out of the litigation of civil actions, see Superior Court Rules, 1974, Annotated 290-96 (Mass. Bar Ed. 1975), a rule which provides the court with adequate opportunity to pass upon the soundness of requested rulings is equally appropriate in criminal practice, *Commonwealth vs. Hassan*, 235 Mass. 26, 31 (1920).

Requiring the requests to be made before the beginning of closing arguments serves the function of apprising opposing counsel of the law under which the case will be decided. In *Wilson v. United States*, 250 F.2d 312, 324 (9th Cir. 1957), the court recognized that the failure to honor requests for rulings on the law could hinder the administration of justice, since there is no real difference between the giving of improper instructions in a jury trial and the judge in a non-jury trial effectually instructing himself improperly on the law.

The failure to present written requests seasonably, however, which results in a trial judge's refusal to allow such requests, vitiates any claim of error in the refusal. *Commonwealth v. Lammi*, 310 Mass. 159, 164 (1941). It is a matter within the sound discretion of the trial judge whether to grant special leave for requests. See *Finkelman v. Kaufman*, 337 Mass. 770 (1958) (Rescript).

It should be noted that under this rule requests are to be made for rulings of law only, and not for findings of fact. Neither this rule nor the prior practice in the Commonwealth requires a judge to honor requests for findings of fact. *Stella v. Curtis*, 348 Mass. 458, 461 (1965).

## Rule 27: Verdict

(Applicable to jury trials in District Court and Superior Court)

### (a) Return

The verdict shall be unanimous. It shall be a general verdict returned by the jury to the judge in open court. The jury shall file a verdict slip with the clerk upon the return of the verdict.

### (b) Several Offenses or Defendants

If there are two or more offenses or defendants tried together, the jury may with the consent of the judge at any time during its deliberations return or be required by the judge to return a verdict or verdicts with respect to the defendants or charges as to which a verdict has been reached; and thereafter the jury may in the discretion of the judge resume deliberation. The judge may declare a mistrial as to any charges upon which the jury cannot agree upon a verdict; provided, however, that the judge may first require the jury to return verdicts on those charges upon which the jury can agree and direct that such verdicts be received and recorded.

### (c) Special Questions

The trial judge may submit special questions to the jury.

### (d) Poll of Jury

When a verdict is returned and before the verdict is recorded, the jury may be polled in the discretion of the judge. If after the poll there is not a unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

# Rule History

*Effective July 1, 1979.*

## Reporter's Notes

(1979)

This rule is patterned after Rule 31 of the Federal Rules of Criminal Procedure. Substantially, it reflects current Massachusetts practice as embodied in the common law and in statute. See former G.L. c. 278, § 11 (St. 1964, c. 108 §§ 1-2).

### Subdivision (a)

This subdivision requires that the verdict be unanimous. This is consistent with Fed. R. Crim. P. 31(a). Accord, Me.R.Crim.P. 31(a); Rules of Criminal Procedure (U.L.A.) rule 535(b) (1974). But see ABA Standards Relating to Trial by Jury § 1.1(b) (Approved Draft, 1968), which allows for less than a unanimous verdict.

The requirement that the jury return a verdict slip with the verdict is a change from existing practice. The verdict slip is a written recital of the verdict. This practice conforms to Rule 535(a) of the Uniform Rules of Criminal Procedure (U.L.A.) (1974). The use of a verdict slip will help reduce errors in the rendering and announcing of verdicts. See *Commonwealth v. Brown*, 367 Mass. 24, 27-29 (1975) (verdicts of not guilty returned, affirmed, and recorded and jury discharged; no error in permitting corrected verdicts to be entered since jury had remained undispersed, in custody, and had not been influenced), *pet. for habeas corpus denied sub nom. Brown v. Gunter*, 428 F. Supp. 889 (D. Mass. 1977), *aff'd*, 562 F.2d 122 (1st Cir. 1977).

### Subdivision (b)

This subdivision permits a jury in multiple-defendant or multiple-offense cases, with the consent of the court, to return a verdict at any time during their deliberations with respect to charges or defendants as to which a verdict has been reached. This rule also permits the court to require the return of such verdicts before the jury has reached a verdict as to all the defendants or charges. In either case, if the court directs, the jury is to continue its deliberations after rendering the verdicts under this subdivision. To the extent that this rule permits the jury to return such verdicts without having reached a decision on all the charges or defendants, it is consistent with Fed. R. Crim. P. 31(b)-(c). Accord Rules of Criminal Procedure (U.L.A.) rule 535(c)-(d) (1974).



This rule also provides that the court may declare a mistrial in cases where the jury is unable to reach a verdict. However, it must first receive and record the verdicts which the jury can agree upon. (See ABA Standards Relating to Trial by Jury §§ 5.4-.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.), *supra*, rule 541.

Subdivision (b) does not prohibit retrial of those defendants as to whom the jury is unable to reach a verdict. This is consistent with Fed. R. Crim. P. 31(b), which provides that, in cases of multiple defendants, disagreements as to one or more defendants has no effect upon the verdict as to any other defendant, and such defendant may be retried without violating the protection of the double jeopardy clause. 8A J. MOORE, FEDERAL PRACTICE para. 31.02 [2] (1978 rev.). It has long been settled that jeopardy does not attach where the jury is discharged after inability to reach a verdict. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *Thames v. Commonwealth*, 365 Mass. 477 (1974). It is within the discretion of the court to declare a mistrial where there is a “manifest necessity.” *United States v. Perez*, *supra* at 580. Unless such “manifest necessity” exists, a second prosecution will be barred by the double jeopardy clause. Since *Perez*, it has been held that where the jury has been unable to agree upon a verdict, the declaration of a mistrial is a “classic example” of manifest necessity. *United States v. Castellanos*, 478 F.2d 749, 751 (2d Cir. 1973). Thus the defendant may be retried without twice being placed in jeopardy.

### Subdivision (c)

One change in Massachusetts law is the elimination of the special verdict. General Laws c. 278, § 11 had authorized the jury to return a special verdict, although this procedure was seldom used. This subdivision does, however, recognize the practice of submitting special questions to the jury. See *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 299-300 (1971), cert. denied, 407 U.S. 910 (1972). Special questions should, however, be used sparingly as they can “catechize” a reluctant juror away from an acquittal and towards a seemingly more ‘logical’ conviction.” *Heald v. Mullaney*, 505 F.2d 1241, 1245 (1st Cir. 1974), cert. denied, 420 U.S. 955 (1975).

### Subdivision (d)

This subdivision is based upon Fed. R. Crim. P. 31(d), but differs in that the polling of the jury is to be discretionary with the court rather than a right of the defendant so as to conform to existing Massachusetts practice. That this discretion is well-settled in the Commonwealth was recently reaffirmed in *Commonwealth v. Stewart*, Mass. Adv. Sh. (1978) 1521, 1533-34. See also *Commonwealth v. Valliere*, 366 Mass. 479, 497 (1974); *Commonwealth v. Caine*, 366 Mass. 366, 375 (1974); *Commonwealth v. Fleming*, 360 Mass. 404, 408 (1971) (jurors polled); *Commonwealth v. Beneficial Finance Co.*, *supra*, at 300-301. Under Rule 31 of the Federal Rules of Criminal Procedure and under the ABA

Standards Relating to Trial by Jury § 5.5 (Approved Draft, 1968), a jury is to be polled only at the request of a party or upon the court's own motion.

In any case, where a jury has been polled and there is not a unanimous concurrence, compare *Commonwealth v. Fleming*, supra, or it appears that the verdict was a compromise or other serious doubts are raised as to its integrity, see *Commonwealth v. Stewart*, supra, the court may declare a mistrial, or alternatively, order further deliberations. Accord, Rules of Criminal Procedure (U.L.A.) rule 535(e) (1974).

## Rule 28: Judgment

(Applicable to District Court and Superior Court)

### (a) Judgment

If the defendant has been determined to be guilty, a verdict or finding of guilty shall be rendered, or if the defendant has been determined to be not guilty, a verdict or finding of not guilty shall be rendered, in open court, and shall be entered on the court's docket.

### (b) Imposition of Sentence

After a verdict, finding, or plea of guilty, or a plea of nolo contendere, or an admission to sufficient facts, the defendant shall have the right to be sentenced without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail as provided by law. Before imposing sentence the court shall afford the defendant or defense counsel an opportunity to speak on behalf of the defendant and to present any information in the mitigation of punishment.

### (c) Notification of Right to Appeal

After a judgment of guilty is entered, the court shall advise the defendant of the right to appeal. In the District Court, upon the request of the defendant, the clerk of the court shall prepare and file forthwith a notice of appeal.

### (d) Presentence Investigation

#### *(1) Criminal Record*

The probation officer shall inquire into the nature of every criminal case or juvenile complaint brought before the court and report to the court information concerning all prior criminal prosecutions or juvenile complaints, if any, and the disposition of each such

prosecution, except where the defendant was found not guilty. Such information is to be presented before a defendant is admitted to bail in court, and also before disposition of the case against the defendant.

## *(2) Report*

The report of the presentence investigation shall contain any prior criminal or juvenile prosecution record of the defendant, but shall not contain any information relating to criminal or juvenile prosecutions in which the defendant was found not guilty. In addition, the report shall include such other available information as may be helpful to the court in the disposition of the case.

## *(3) Availability to Parties*

Prior to the disposition the presentence report shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

## *(e) Filing*

The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent. With the consent of both parties, the judge may specify a time limit beyond which the case may not be removed from the file, and may specify any events that may cause the case to be removed from the file. The defendant shall file a written consent with the court as to both the filing of the case and any time limit or events regarding removal from the file. Prior to accepting the defendant's consent, the court shall inform the defendant on the record in open court:

- (i) that the defendant has a right to request sentencing on any or all filed case(s) at any time;
- (ii) that subject to any time limit imposed by the court, the prosecutor may request that the case be removed from the file and sentence imposed if a related conviction or a disposition is reversed or vacated or upon the prosecutor's establishing by a preponderance of the evidence either that the defendant committed a new criminal offense or that an event occurred on which the continued filing of the case was expressly made contingent by the court; and

- (iii) that if the case is removed from the file the defendant may be sentenced on the case.

In sentencing the defendant after the removal of a case from the file, the court shall consider the over-all scheme of punishment employed by the original sentencing judge.

## Rule History

*Amended December 17, 2008, effective April 1, 2009; amended February 22, 2022, effective April 1, 2022.*

## Reporter's Notes

### (2022)

This amendment to Rule 28(e)(ii) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020). Gendered language was also removed in Rule 28(a), (b), (c), and (d)(1).

### (2008)

This section was added to meet the concerns the Supreme Judicial Court expressed in its opinion in *Commonwealth v. Simmons*, 448 Mass. 687 (2007). It addresses the procedure for placing a case on file without a sentence after a guilty verdict, a guilty finding or a plea of guilty. Before a court can place a complaint or indictment on file, both the defendant and the Commonwealth must consent. The defendant's consent is necessary because the suspension of the case deprives the defendant of the right to be sentenced in a timely fashion and the right to appeal. See *Simmons*, 448 Mass. at 698; *Commonwealth v. Delgado*, 367 Mass. 432, 438 (1975); *Marks v. Wentworth*, 199 Mass. 44, 45 (1908). The defendant's consent must be in writing and made part of the record in the case.

The Commonwealth's consent is necessary both because it accords with the historical practice, see *Commonwealth v. Dowdican's Bail*, 115 Mass. 133, 136 (1874) (“It has long been a common practice in this Commonwealth . . . to order, with the consent of the defendant **and of the attorney for the Commonwealth**, and upon such terms as the court in its discretion may impose, that the indictment be laid on file . . .”) (emphasis added), and because of the general public interest in seeing the timely imposition of a sentence.

If the judge does not otherwise specify, a filed case remains inactive indefinitely. The judge may, however, provide for the time frame within which the case may be brought forward as well as the occurrence of any events that would serve as the predicate for removing the case from the file. See, e.g., *Commonwealth v. Marinucci Bros. & Co.*, 354 Mass. 743, 745

(1968) (defendant paying restitution); *Commonwealth v. Pelletier*, 62 Mass. App. Ct. 145, 146-147 (2004) (defendant serving a specified term in prison before being paroled). Since both the Commonwealth and the defendant have a right to have the judge impose a sentence, by implication if the judge sets a time limit or establishes a contingency that would bring the case forward, both parties must agree.

The notice the defendant must receive about the implications of filing a case without imposing sentence is similar to a guilty plea colloquy in that it must occur in open court on the record. It is, however, not as detailed as a guilty plea colloquy nor must the judge specifically address the question of voluntariness, as would be the case with a guilty plea. Cf. Rule 12(a)(5). The defendant must, however, file with the court a signed statement agreeing to the filing of the case without a sentence and acknowledging the time frame within which the case can be removed from the file as well as the occurrence of any events that would serve as the predicate for its removal.

Subsection (i) requires the court to inform the defendant that he or she has the right to request that a case be removed from the file at any time. This reflects the historical practice surrounding the filing procedure, see *Commonwealth v. Chase*, Thatcher's Crim. Cas. 267, 268-269 (Boston Mun. Ct. 1831) quoted in *Commonwealth v. Simmons*, 448 Mass. 687, 696 (2007) ("the [defendant] might at any time [appear] in court, and [demand] the judgment of law."); *Commonwealth v. Dowdican's Bail*, 115 Mass. 133, 136 (1874) ("[the practice of filing] leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward"). Since a defendant ordinarily cannot obtain appellate review of a filed case, see *Commonwealth v. Delgado*, 367 Mass. 432, 438 (1975), allowing the defendant to remove a case from the file is the only way to effectuate the right to appeal.

Subsection (ii) requires the defendant to receive notice of the reasons why the case can be removed from the file. One contingency that must be part of the notice in every case is the possibility that a related conviction was reversed or a related sentence vacated or modified. In the usual instance, a related conviction will be one that was joined for trial with the complaint or indictment that is being filed. See, e.g., *Commonwealth v. Owens*, 414 Mass. 595, 596 (1993). In some circumstances, however, a conviction that results from a separate proceeding may be based on the same course of criminal conduct as the filed case. In that situation, if the conviction or sentence in the separate case were reversed or vacated, the filed case could be brought forward.

Another element of the notice the defendant must receive under subsection (ii) is that the case may be removed from the file if the defendant commits a new criminal offense. The Supreme Judicial Court has recognized that historically, an implicit condition of a case

remaining on file was the defendant's good behavior. See *Commonwealth v. Simmons*, 448 Mass. 687, 697 (2007). In *Simmons* itself, the Court approved the removal of an indictment from the file because the defendant was charged with a new offense. "Future criminal conduct" rather than "good behavior" is a more appropriate standard to incorporate into contemporary procedure given the existence of probation and the need to provide fair notice to the defendant of the reasons why a case might be brought forward for sentencing. If a defendant's future behavior has to be monitored on a long-term basis beyond the specific criterion of avoiding future criminal conduct, probation is a more appropriate vehicle than placing a case on file. The notice also informs the defendant that the issue of future criminal behavior is one that the prosecutor must establish by a preponderance of the evidence in order to justify removing a case from the file and having the court impose a sentence. The preponderance standard is the one that governs a probation revocation hearing, which is the closest analogy to removing a case from the file. See *Commonwealth v. Holmgren*, 421 Mass. 224, 226 (1995). It is also the standard that a judge must apply in sentencing. See *Nichols v. United States*, 511 U.S. 738, 748 (1994); *Commonwealth v. Nawn, Jr.*, 394 Mass. 1, 7 (1985).

Subsection (ii) also recognizes that in an individual case a judge may make bringing the case forward contingent upon a specific event, such as the defendant paying restitution, see e.g. *Commonwealth v. Marinucci Bros. & Co.*, 354 Mass. 743, 745 (1968), or serving a specified term in prison before being paroled, see e.g. *Commonwealth v. Pelletier*, 62 Mass. App. Ct. 145, 146-147 (2004). The defendant must receive explicit notice of any such contingency.

Subsection (iii) requires the court to inform the defendant that if the case is removed from the file, the defendant can receive a sentence that entails additional punishment. Cf. *Simmons*, 448 Mass. at 695 n.9. This provision does not require the type of colloquy concerning the details of a maximum sentence that must accompany a guilty plea. Cf. Rule 12(c)(3)(B). The defendant must, however, be made aware of the possibility of additional punishment and the judge should tailor the amount of information on this topic to the needs of each specific case.

The last provision in this section addresses the power of a judge to impose a sentence after a case is removed from the file. The Supreme Judicial Court has made clear that when a case is brought forward from the file, the judge, in deciding on what sentence to impose, must conform the new sentence to "the over-all scheme of punishment employed by the trial judge." *Simmons*, 448 Mass. at 699. This requirement means the sentencing judge has to take into account two limitations. One is the length of the original sentencing scheme. In *Simmons*, for example, the Court determined that the disparity between the two sentences

was too great where a defendant was originally sentenced to concurrent terms of eight to twelve years on six armed robbery indictments and five years later received a sentence of eighteen to twenty years on a single count of armed assault with intent to rob that had been removed from the file. See *id.* at 699. It may be appropriate in some cases for the judge who orders a case placed on file to indicate what type of sentence is contemplated if the case is ever removed from the file. The other limitation stems from the requirement of due process that a defendant not be punished for conduct other than that for which he or she was convicted. See *Commonwealth v. Bianco*, 390 Mass. 254, 259 (1983). Since an allegation of new criminal conduct will often be the occasion for bringing a case out of the file, the judge should take care not to impose a harsher sentence on the filed case because the defendant “has not demonstrated his innocence of [the] unrelated, pending charge.” *Commonwealth v. LeBlanc*, 370 Mass. 217 (1976).

## (1979)

The format and much of the language of this rule is derived from Rule 32 of the Federal Rules of Criminal Procedure. Subdivision (c) is taken from Rule 3.670 of the Florida Rules of Criminal Procedure (1975). The Federal Rule has been significantly modified so as to conform to existing Massachusetts practice.

### Subdivision (a)

This subdivision is a restatement of Rule 3.670 of the Florida Rules of Criminal Procedure (1975). It requires the verdict or finding, whether it is guilty or not guilty, to be rendered in open court and entered on the court’s docket. See Fed. R. Crim. P. 32(b)(1); Rules of Criminal Procedure (U.L.A.) rule 621 (1974).

### Subdivision (b)

The defendant has the right to prompt sentencing. See G.L. c. 279, § 4; *Commonwealth v. Kossowan*, 265 Mass. 436 (1929); *In re Lebowitch*, 235 Mass. 357 (1920). See ABA Standards Relating to Sentencing Alternatives & Procedures § 5.4(a) (Approved Draft, 1968). However, the defendant can waive that right. When the defendant consents to a continuance of the case or a probationary term, he has by implication waived his right to prompt sentencing. Compare Fla.R.Crim.P. 3.670 (1975).

Pending the pronouncement of sentence, the court may commit the defendant, place him on probation, or release him on bail in a manner consistent with existing law. See G.L. c. 276, §§ 58, 65, 87. The terms of his release may subsequently be altered by the court. See ABA Standards Relating to Post Conviction Remedies § 5.21(b) (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 611 (1974); 18 U.S.C. § 3148.

Finally, this subdivision grants to the defendant or his counsel the opportunity to speak on behalf of the defendant and to offer any information which may serve to mitigate the sentence to be imposed. While there is no constitutional or other right to allocution, *Commonwealth v. Curry*, Mass. App. Ct. Adv. Sh. (1978) 977 (Rescript); *Jeffries v. Commonwealth*, 94 Mass. (12 Allen) 145, 153 (1866), this opportunity has traditionally been afforded the defendant at common law and may have therapeutic value for the defendant as well as potential for mitigation. 8A J. MOORE, *FEDERAL PRACTICE* para. 32.05 (1978 rev.). In *Green v. United States*, 365 U.S. 301 (1961), the Supreme Court indicated that the right to allocution was a personal one and could not be satisfied by only affording the opportunity to the defendant's counsel. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304. For the procedure to be followed if a denial of the right to allocution is found, see *Hill v. United States*, 368 U.S. 424 (1962). See ABA Standards Relating to Sentencing Alternatives & Procedures § 5.4(a)(iii) (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 613(2) (1974).

### Subdivision (c)

This subdivision is meant to assure that the defendant is informed of his right to appeal following a finding of guilty, a finding of sufficient facts to warrant a finding of guilty, or imposition of sentence in a District Court jury-waived session or after a verdict or finding of guilt in a District Court jury session or the Superior Court. See Superior Court Rule 65 (1974), as amended, 1977).

General Laws c. 278, § 18 (as amended, St. 1978, c. 478, § 302) permits a defendant convicted in District Court jury-waived session to appeal either from a sentence or from a finding of guilty where no sentence is imposed. Rule 9 of the District Court Initial Rules of Criminal Procedure (1971) provides that either the judge or the sessions clerk may inform the defendant of his right to his de novo appeal to a jury session. That practice is in conformity with this rule. Compare Fed. R. Crim. P. 32(a)(2) with Rules of Criminal Procedure (U.L.A.) 613(4) (1974), both of which provide that the judge is to inform the defendant of his right to appeal.

This rule is much more limited in its operation than the Federal Rule, which requires notice of the defendant's right to appellate review to correct errors. This rule does, however, direct the District Court clerk to file the notice of appeal on behalf of the defendant upon his request, which is consistent with the federal rule.



## Subdivision (d)

This rule preserves the distinction between the defendant's criminal record and the full probation report which was emphasized in *Commonwealth v. Martin*, 355 Mass. 296 (1969).

Subdivision (d)(1) is essentially a restatement of existing law. See G.L. c. 276, § 85; G.L. c. 279, § 4A, pursuant to which the defendant is given the right to see his criminal record. This rule affords the court the important right to inspect probation records regarding a defendant's prior criminal convictions or other dispositions, exclusive of not guilty findings, prior to his release on bail. But see District Court Initial Rules of Criminal Procedure 8 (1971), which would prohibit the use of probation records for bail determination.

Support can be found for the position taken in this subdivision in G.L. c. 119, §§ 60, 61A (as amended, St. 1978, c. 478, § 64). Section 60 authorizes the consideration of juvenile delinquency records before imposition of sentence in criminal proceedings. Section 60A provides the same basic standard for the availability of juvenile records for inspection in appeals to a juvenile appeals session from adjudications of delinquency as does subdivision (d)(3), *infra*, for the availability of the records of criminal and juvenile prosecutions prior to sentencing in criminal proceedings.

Although G.L. c. 279, § 4A mandates that the criminal record is not to include information concerning prior charges of which the defendant was acquitted, it does not require exclusion of information as to other pending charges. *Commonwealth v. Franks*, Mass. Adv. Sh. (1977) 858 (Rescript); *Commonwealth v. LeBlanc*, 370 Mass. 217, 222 (1976); *Commonwealth v. Settipane*, 5 Mass. App. Ct. \_\_\_, \_\_\_ (1977), Mass. App. Ct. Adv. Sh. (1977) 1110, 1117. The consideration of other charges is appropriate as long as the judge makes clear that he is not passing on guilt or innocence on the untried charges, the resulting sentence is within statutory limits, and there is no basis in the record for apprehension of vindictiveness or retaliatory motivation. *Settipane*, *supra*. Accord *Franks*, *supra*.

There is no constitutional objection to a judge knowing of other pending charges, although due process would require resentencing if inaccurate, unreliable or misleading information had been considered at sentencing, or if the judge had undertaken to punish the defendant for conduct other than that of which he is immediately convicted. *Commonwealth v. LeBlanc*, *supra* at 221, and cases cited. For a similar example of factors beyond the scope of consideration for sentencing, see *Commonwealth v. Murray*, 4 Mass. App. Ct. (1976), Mass. App. Ct. Adv. Sh. (1976) 889.

Subdivision (d)(2) contemplates a probation report concerning the defendant which will include the criminal record of subdivision (d)(1) and also other information about the defendant which may assist the court in disposing of the case. The authorization for such reports is found in G.L. c. 276, § 100, as noted in *Commonwealth v. Martin*, supra. The probation report of this subdivision may be used by the court for purposes of sentencing as well as for other purposes, such as the setting of bail. To the extent that this report is multiple-purpose, it is somewhat different than the presentence investigation report of Fed. R. Crim. P. 32(c)(1)-(2), which is used primarily for the purpose of sentencing following a determination of guilt. See Rules of Criminal Procedure (U.L.A.) rule 612 (1974). Other sources also recommend the use of presentence investigative reports following a guilty finding. See ABA Standards Relating to Sentencing Alternatives & Procedures §§ 4.1(b), 4.2(a), 4.3, 4.4(a)-(b) (Approved Draft, 1968); ALI Model Code of Pre-Arrestment Procedure § 320.4 (P.O.D. 1975); National Advisory Commission on Criminal Justice Standards & Goals, Corrections, standards 5.14(1), (3); 5.15(1); 5.16; 16.10 (1973).

Subdivision (d)(3) states that generally the report compiled by the probation department shall be made available to the defendant and his counsel and to the prosecutor. The court in *Commonwealth v. Martin*, supra, held that the defendant did not have a right to see the report, but stated that “the administration of justice would be improved by a liberal and generous use of the power to disclose.” *Id.* at 303, quoting *United States v. Fischer*, 381 F.2d 509, 512-13 (2d Cir.), cert. denied, 390 U.S. 973 (1967). The court stated that the main consideration against full disclosure is the prospect that the revelation of certain material given the probation officer in confidence, would result in the destruction of the sources of such material and its availability. *Commonwealth v. Martin*, supra, at 303.

This subdivision further conditions availability upon the judge’s determination that disclosure would not “result in harm, physical or otherwise, to the defendant or other persons.” This qualification accords with Fed. R. Crim. P. 32(c)(3)(A). ABA Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft 1968), also recommends disclosure of presentence reports with certain exceptions, as does ALI, Model Code of Pre-Arrestment Procedure § 320.4 (P.O.D. 1975).

The next to last sentence of this subdivision provides that if any portion of the report is not made available, then the judge is not to rely upon any information contained in that portion in determining sentence. See *Gardner v. Florida*, 430 U.S. 349 (1977) (denial of due process to impose death sentence on basis of information contained in undisclosed presentence report which defendant could not deny or explain).

# Rule 29: Revision or Revocation of Disposition

(Applicable to District Court and Superior Court)

## (a) Revision or Revocation

### *(1) Illegal Dispositions*

The trial judge, upon the judge's own motion, or the written motion of the prosecutor, filed within sixty days of a disposition, may revise or revoke such disposition if the judge determines that any part of the disposition was illegal.

### *(2) Unjust Dispositions*

The trial judge, upon the judge's own motion, or the written motion of a defendant, filed within sixty days of a disposition, within sixty days of issuance of a rescript by an appellate court on direct review, or within sixty days of the disposition of criminal charges against a codefendant may, upon such terms and conditions as the judge shall order, revise or revoke such disposition.

## (b) Affidavits

If a party files a motion pursuant to this rule, the party shall file and serve, and the other party may file and serve, affidavits in support of their respective positions. The judge may deny a motion filed pursuant to this rule on the basis of facts alleged in the affidavits without further hearing.

## (c) Notice

The moving party shall serve the other party with a copy of any motion and affidavit filed pursuant to this rule. If the judge orders that a hearing be held on the motion, the court shall give the parties reasonable notice of the time set for the hearing.

## (d) Place of Hearing

A motion filed pursuant to this rule may be heard by the trial judge wherever the judge is then sitting.

## (e) Appeal

An appeal from a final order under this rule may be taken to the Appeals Court, or the Supreme Judicial Court in an appropriate case, by either party.

## Rule History

*Amended June 8, 2016, effective September 1, 2016; amended February 22, 2022, effective April 1, 2022.*

## Reporter's Notes

### (2022)

This amendment addresses two aspects of the operation of Mass. R. Crim. P. 29. The first clarifies the applicability of Mass. R. Crim. P. 29(a)(1) when the Commonwealth seeks to redress an illegal disposition following a continuance without a finding, or other non-conviction disposition, rather than following a conviction. The second sets forth a narrow exception in Mass. R. Crim. P. 29(a)(2) to the sixty-day time limit for filing a motion to revise or revoke an unjust sentence when the motion is based on the disposition of criminal charges against a codefendant.

In *Commonwealth v. Beverly*, 485 Mass. 1 (2020), the Supreme Judicial Court held that Mass. R. Crim. P. 29 was the appropriate vehicle for the Commonwealth to challenge as an illegal disposition a continuance without a finding imposed without any terms or conditions, or without a term of probation. The Court explained that a continuance without a finding was a “disposition” pursuant to G.L. c. 278, § 18, and that “where the sentencing disposition of the criminal case is claimed to be illegal, whether it be a conviction, straight probation, or a continuance without a finding, it is subject to a challenge pursuant to a rule 29 motion to revise or revoke.” *Id.* at 10. This amendment to Rule 29 implements *Beverly* by replacing “sentence” with “disposition” to reflect more accurately the circumstances under which relief is available under this rule.

In *Commonwealth v. Tejeda*, 481 Mass. 794 (2019), the Supreme Judicial Court recognized under its superintendence authority a limited exception to the rule that motions to revise or revoke must be based upon facts existing at the time of the original disposition. *Tejeda* involved an armed robbery in which the coventurers were tried separately. *Tejeda*’s trial occurred first, and upon conviction he received a sentence for the robbery of six to eight years. His coventurer’s later trial also resulted in a conviction, for which he received a sentence (from a different judge) of five to seven years. *Tejeda* moved for revision of his

sentence based on the disparity between his disposition and that of his coventurer, given his own lesser or at most equal culpability in the crime.

The Supreme Judicial Court acknowledged that ordinarily the trial judge weighing a motion to revise or revoke may consider whether the sentence was unjust only “in light of facts as they existed at the time of the sentencing.” *Tejeda*, id., citing *Commonwealth v. DeJesus*, 440 Mass. 147, 152 (2003) (“[A] motion to revise or revoke can rely only on facts or circumstances that existed at the time of sentencing”). However, the disposition of a codefendant and any disparity between the sentences of codefendants are appropriately considered at sentencing. It would be arbitrary, the Court found, to permit consideration of a codefendant’s sentence when imposed contemporaneously with that of the defendant yet preclude it when the codefendant is sentenced more than sixty days after the defendant. *Tejeda*, 481 Mass. at 797.

Thus the Court in *Tejeda* allowed a limited exception permitting the trial judge to consider the subsequent facts of the codefendant’s sentence in weighing a motion to revise or revoke when the codefendant was tried separately, sentenced later, convicted of the same crime, and where at the time of the original sentencing it was reasonably apparent that the defendant was less culpable than or equally culpable to the codefendant. *Tejeda*, 481 Mass. at 796-797. This amendment to Rule 29 furthers the principle elucidated in *Tejeda* by allowing a defendant to move, or a trial judge sua sponte, to consider the disposition of criminal charges against a codefendant at any time within sixty days of that disposition, even though more than sixty days have passed since the defendant's sentencing.

Although this amendment provides a third period for revision of a disposition, the sixty-day period in which to file a motion under Rule 29 remains jurisdictional. See *Commonwealth v. Sitko*, 372 Mass. 305, 312-313 (1977) (under Rule 29 predecessor G.L. c. 278, § 29C judge lacks power to extend the sixty-day period); *Commonwealth v. Rodriguez*, 461 Mass. 256, 260 (2012) (A judge “is not barred from reducing a sentence the judge has imposed until the time limits established in rule 29 to revise or revoke a sentence have expired.”).

While a judge’s authority under Rule 29 to revise or revoke an illegal or unjust disposition is subject to this sixty-day period, when the disposition is one of probation the judge may always amend the conditions of probation under proper circumstances, so long as the judge does not significantly increase the severity of the original probation terms. *Buckley v. Quincy Division of the District Court Department*, 395 Mass. 815, 817, 819 (1985) (“The addition of reasonable conditions to an individual’s probation does not constitute a revision or revocation of a sentence under rule 29.”) See also, *Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing* (March 2016, Updated October 2019), Commentary to Principle 10 (noting prospect of removal or

relaxation of probation conditions can be a valuable incentive for promoting compliance with probation) at 16-17; Boston Municipal Court and District Court Sentencing Best Practice Principles (August 27, 2017), Principle 7 (judge may incorporate written provision in sentencing that after a period of successful compliance the court may consider early probation termination or vacation of certain conditions of probation as an incentive, and that this principle is not intended to abrogate authority under Mass. R. Crim. P. 29) at 2.

## (2016)

This amendment to Rule 29 is intended to fill a gap in the Rules of Criminal Procedure identified by the Supreme Judicial Court in *Commonwealth v. Selavka*, 469 Mass. 502 (2014), in which the Court upheld the Commonwealth's authority to move to correct an illegal sentence. After noting that neither former Rule 29(a) nor Rule 30(a) permitted a Commonwealth motion to revise or revoke an illegal sentence, the Court concluded that "rule 29(a), with its sixty-day time frame, is the proper vehicle by which the Commonwealth may challenge illegal sentences." *Selavka*, 469 Mass. at 508. This amendment to Rule 29 permits the Commonwealth to seek such relief.

### Rule 29(a) Revision or Revocation

Rule 29(a)(1), *Illegal Sentences*, provides that, within 60 days after a trial judge imposes a sentence, either the Commonwealth or the judge may move to revise or revoke that sentence if any part of the sentence is illegal. While Rule 29(a) has long authorized a trial judge to increase a sentence under Rule 29(a), either because the sentence imposed is illegal or, on reflection, unjust, see *Commonwealth v. Aldoupolis*, 386 Mass. 260, 268-270 (1982), former Rule 29 did not authorize the Commonwealth to seek revision or revocation of a sentence for any purpose. See *Selavka*, 469 Mass. at 506. Rule 29(a)(1) makes it clear that the judge's authority to correct an illegal sentence remains unchanged, but the rule further permits the Commonwealth to seek such relief. This narrow provision for a Commonwealth motion to revise or revoke a sentence is intentionally limited to correcting an illegal sentence; it does not permit a motion to increase a legal sentence that the prosecutor considers to be legal but unduly lenient.

Rule 29(a)(1)'s authority to challenge an illegal sentence within 60 days of sentencing is limited to the Commonwealth and the trial judge for two reasons. First, the defendant is already authorized to file such a motion. Rule 29(a)(2), *Unjust Sentences*, leaves unchanged the defendant's right to challenge a sentence "if it appears that justice may not have been done," which includes a sentence imposing punishment not permitted by law. See *Selavka*, 469 Mass. 508 n. 7. Quite apart from Rule 29(a), Rule 30(a) gives the defendant the right to challenge an illegal sentence at any time.

Second, a successful prosecution or judicial motion to revise or revoke an illegal sentence that is too lenient would result in additional punishment, which, if unduly belated, would implicate the defendant's double-jeopardy interest in sentence finality even though the original sentence was illegal. See *Selavka*, 469 Mass. at 509. The Court in *Selavka* concluded that limiting the potential for such upward adjustment of an illegal sentence to Rule 29(a)'s 60-day timeframe marks a reasonable balance between a defendant's interest in sentence finality and society's interest in enforcement of the sentencing laws. *Selavka*, 469 Mass. at 508. Rule 29(a)(1) thus provides for a 60-day time limit for the Commonwealth to file a motion seeking, or for the judge to initiate consideration of, the revision or revocation of an illegal sentence. After that, any motion to revise or revoke an illegal sentence must come from the defendant under Rule 30(a), which would raise no double-jeopardy problems.

Rule 29(a)(1) includes revocation as a potential remedy for an illegal sentence that is too lenient, in part because that sentence might have been the result of a guilty plea from which the defendant could have withdrawn had the sentence been more harsh than it was. See Rule 12(c)(4) (permitting defendant to withdraw (1) from a District-Court plea if the judge intends to impose a sentence in excess of defendant's request and (2) from a Superior-Court plea if the judge intends to sentence in excess of either the agreed recommendation or the prosecutor's recommendation); Rule 12(d)(4) (requiring a judge who accepts a plea agreement providing for both a charge concession and a specific sentence to impose the agreed sentence and permitting the defendant to withdraw if the judge rejects the plea agreement); former Rule 12(c)(2) (permitting defendant to withdraw (1) from a District-Court plea if the judge intends to impose a sentence in excess of defendant's request and (2) from a Superior-Court plea if the judge intends to sentence in excess of an agreed recommendation on which the plea was contingent). At the very least, such a case would require re-sentencing, with the defendant presumably having the right to withdraw the plea if Rule 12 would have afforded that right at the plea hearing and initial sentencing. See *Selavka*, 469 Mass. at 514-515.

Rule 29(a)(2), Unjust Sentences, clarifies former Rule 29(a)'s provision for filing a motion to revise or revoke an unjust sentence following appellate review.

First, the rule makes clear that, other than the imposition of sentence, the only event that triggers the sixty-day period to file a Rule 29(a)(2) motion is the appellate court's issuance of the rescript in a case on direct review. If the conviction is affirmed, the issuance of the rescript marks the point at which the conviction becomes final, see *Foxworth v. St. Amand*, 457 Mass. 200, 206 (2010), making it an appropriate time for filing a motion to revise or revoke the sentence based on that conviction. Although on its face the rule does not limit

such motions to cases in which the conviction is affirmed, as a practical matter, a conviction's reversal would result in vacation of the sentence, leaving nothing to revise or revoke.

Pegging the beginning of the sixty-day filing period to the rescript's issuance permits a defendant whose conviction is affirmed by the Appeals Court to seek either rehearing or further appellate review without impinging on the time period for filing a motion to revise and revoke. Rule of Appellate Procedure 23 requires the Appeals Court, after deciding an appeal and mailing the decision to the parties, to wait twenty-eight days before issuing the rescript, see Mass. R.A.P. 23, thereby affording the parties time to file for rehearing or further review. See Mass. R.A.P. 27 (petition for rehearing to be filed within fourteen days of decision); Mass. R.A.P. 27.1 (application for further review to be filed within twenty days of decision). If either is granted, the rescript's issuance is stayed pending disposition of that proceeding. See Mass. R.A.P. 23. Finally, the appellate court's issuance of the rescript, finalizing a conviction which is affirmed, is a procedural event of which the defendant would surely be aware and thus a fair time for the sixty-day filing period to begin. The amendment eliminates the uncertainty caused by basing the time period on the trial court's receipt of the rescript, which was subject to the vagaries of mail delivery and clerical document processing.

Second, by confining the extension of the sixty-day filing period to cases on direct review, Rule 29(a)(2) clarifies the reach of its predecessor. Former Rule 29(a) did not specify whether a rescript on appellate review of a collateral attack on a sentence would allow a Rule 29 motion, though the Appeals Court found in an unpublished opinion that it would not. *Commonwealth v. White*, No. 08-P-766, 74 Mass. App. Ct. 1115, 2009 Mass. App. Unpub. LEXIS 788, at \*3-\*6 (Mass. App. Ct. June 4, 2009). The rule's purpose is to permit the trial judge to revise or revoke a sentence that, based on the facts existing at the time of sentencing, appears in retrospect to have been unjust. See *Commonwealth v. Rodriguez*, 461 Mass. 256, 260 (2012); *Commonwealth v. DeJesus*, 440 Mass. 147, 152 (2003). This purpose is best served if the sentence review prompted by the motion occurs reasonably soon after the sentence's imposition. See *Commonwealth v. Barclay*, 424 Mass. 377, 380 (1997) (holding Rule 29 motion must be decided within reasonable time of its filing); *Commonwealth v. Layne*, 386 Mass. 291, 295-296 (1982) (noting that, with “the passage of time from the date of sentencing, it becomes increasingly difficult for a trial judge to make the determination called for by [then Rule 29(a)] without improperly considering postsentencing events”). Rule 29(a)(2) accordingly limits the filing time to sixty days from the imposition of sentence or from the issuance of the rescript in any direct appeal, the latter filing period commencing as soon as the conviction becomes final. The former rule's provision permitting filing within sixty days of any appellate court order or judgment



“denying review of, or having the effect of upholding, a judgment of conviction” has been deleted as being either redundant (if the order or judgment in question is part of the rescript concluding a direct appeal), or not sufficiently clear.

Finally, Rule 29(a)(2) achieves gender neutrality.

## Rule 29(b) Affidavits

Rule 29(b), Affidavits, is amended to accommodate the Commonwealth's narrow authority to file a motion to revise or revoke an illegal sentence under the rule, authorizing both parties to file appropriate affidavits in that event. Consistent with Rule 18(a)(3), the amended rule further provides that the judge may deny a motion filed under Rule 29(a) without a hearing, based solely on the affidavits. Mass. R. Cr. P. 18(a)(3), Presence [of Defendant] Not Required, 378 Mass. 887 (1979) (“A defendant need not be present at a revision or revocation of sentence pursuant to Rule 29 or at any proceeding where evidence is not to be taken.”) However, any revision or revocation of a sentence under Rule 29, whether because the sentence imposed is illegal or unjust, must be predicated on a hearing. See E. B. Cypher, *Revise or Revoke of Sentence Hearings*, 30A Criminal Practice and Procedure, § 30:27 (4th ed. Mar. 2015). See also *Thompson v. United States*, 495 F.2d 1304, 1307 (1st Cir. 1974) (vacating post-trial sentence imposed in absentia to correct an illegal sentence, holding defendant must be present for re-sentencing; cited by Reporter's Notes to Mass. R. Cr. P. 18(a), Presence of Defendant, as example of sentencing requiring defendant's presence). Although the defendant does not have the right to present evidence at this hearing, see *Commonwealth v. Coggins*, 324 Mass. 552, 556-557, cert. denied, 338 U.S. 881 (1949), he or she has the right to be present and to be heard. See *Aldoupolis v. Commonwealth*, 386 Mass. 260, 275-276 (1982); E. B. Cypher, *Presence of the Defendant at the [Rule 29] Hearing*, 30B Criminal Practice and Procedure, § 41:12 (4th ed. Mar. 2015). Further, any victim(s) covered by G.L. c. 258B, Rights of Victims and Witnesses of Crime, may present a victim-impact statement at such a hearing. See *Commonwealth v. Doucette*, 81 Mass. App. Ct. 740, 742, rev. denied, 463 Mass. 1103 (2012) (upholding judge's discretion under G.L. c. 258B, § 3(p) to permit victims to be heard on Rule 30(a) motion for a new trial, adding that “[t]he victim's family was also entitled [under the statute] to make a victim impact statement at sentencing or disposition”).

## Rule 29(c) Notice—(d) Place of Hearing

Rule 29(c), Notice, and Rule 29(d), Place of Hearing, are amended (1) to recognize the Commonwealth's narrow authority to file a motion to revise or revoke an illegal sentence, and (2) to achieve gender neutrality.

## Rule 29(e) Appeal

Rule 29(e) provides that either party may appeal from a final order under the rule. This provision clarifies that the Commonwealth may appeal a denial of its motion to revise or revoke an illegal sentence. Prior to Rule 29(e), a defendant's right to appeal the denial of a motion to revise or revoke a sentence was well established, see *Commonwealth v. Richards*, 44 Mass. App. Ct. 478, 481 (1998), as was the Commonwealth's right to appeal the allowance of such a motion. See *Commonwealth v. Cowan*, 422 Mass. 546, 547 (1996) (recognizing Commonwealth's right under G.L. c. 211, § 3 to appeal District Court allowance of Rule 29 motion); *Commonwealth v. Amirault*, 415 Mass. 112, 115 (1993) (same under G.L. c. 278, § 28E for Superior Court motion). In contrast, while the Commonwealth had the right to move to correct an illegal sentence and presumably the attendant right to appeal the denial of such a motion, see *Commonwealth v. Selavka*, 469 Mass. 502, 507 & n. 6 (2014), its avenue for pursuing that appeal was not clear. *Id.* Rule 29(e) cures that deficiency.

## (1979)

Rule 29 is drawn in part from Fed. R. Crim. P.35 and from former G.L. c. 278, §§ 29A (St. 1959, c. 167, § 1) and 29C (St. 1962, c. 310, § 2). See Rules of Criminal Procedure (U.L.A.) rule 633 (1974).

## Subdivision (a)

General Laws c. 278, § 29A, which was applicable to sentences imposed upon a plea without trial in the District Court, and § 29C, which was applicable to sentences imposed after plea or trial in the Superior Court provided the 60-day limit incorporated into this subdivision. It should be noted that under §§ 29A and 29C, a sentence could only be revised or revoked within 60 days after imposition; pursuant to this subdivision, a sentence may be revised or revoked at any time so long as the defendant's motion is filed within 60 days after imposition of the sentence, or within 60 days after the finality of the conviction is established upon direct appeal or after such review is denied or withdrawn. This subdivision enlarges the power of the District Court so that it is commensurate with that of the Superior Court under former G.L. c. 278, § 29C so as to enable the judge to revise or revoke a sentence imposed after a trial in the District Court. Under prior practice, a de novo appeal to the Superior Court was deemed to vacate the District Court judgment and to "render immaterial . . . all . . . errors and irregularities in the proceedings" below. *Commonwealth v. Holmes*, 119 Mass. 195, 199 (1875). *Accord Enbinder v. Commonwealth*, 368 Mass. 214, 217 (1975). For that reason, G.L. c. 29A expressly did not apply to appealed cases. Now, under this rule, a claim of appeal from a District Court jury-waived session to a

jury session divests the judge who imposed the original sentence of the power to revise or revoke that sentence.

The rule governs reductions of sentences motivated by demands of fairness. It is thus a rule which accords the trial judge broad discretion. As was stated in *District Attorney for the Northern District v. Superior Court*, 342 Mass. 119 (1961):

*Occasions inevitably will occur where a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account.*

Id. at 128. If within sixty days after sentence has been imposed, the trial judge for any reason feels the sentence that has been imposed is too harsh, he is permitted to reduce it sua sponte, although he is not permitted to consider events occurring after the original imposition. *Commonwealth v. Sitko*, Mass. Adv. Sh. (1977) 668, 676-78.

Subdivision (a) speaks only in terms of a motion by the defendant, although in prior practice motions of the Commonwealth to revise or revoke a sentence were not unknown. *Commonwealth v. Sitko*, supra.

The 60-day period established by the rule is absolute, and the trial judge has no power to extend the time within which the motion must be filed or within which the sentence may be altered sua sponte. Mass. R. Crim. P. 46(b); *Commonwealth v. Burrone*, 347 Mass. 451 (1964). However, under this rule, once the motion is filed, he may act on it at a time later than 60 days.

The view under the common law was that so long as nothing had been done to carry a sentence into execution, "it was, in contemplation of law, in the breast of the court, and subject to revision and alteration." *Commonwealth v. Weymouth*, 84 Mass. (2 Allen) 144, 145-46 (1862). The modern view is that a sentence may be reduced by judicial action even though the defendant has commenced serving it. *District Attorney for the Northern District v. Superior Court*, 342 Mass. 119, 126-28 (1961). That an increase in the sentence once execution has commenced is not permitted has, however, long been settled. *United States v. Benz*, 282 U.S. 304, 307-09 (1931); *Ex parte Lange*, 18 U.S. (Wall.) 163, 167-74 (1873).

A mistake in the mittimus under which a defendant is serving his sentence may be corrected at any time because such a revision does not change the sentence imposed, only the transcription of that sentence. *Bolduc v. Commissioner of Correction*, 355 Mass. 765 (1969).

## Subdivision (b)

The objective of subdivision (b) is to encourage the disposition of post-conviction motions upon affidavit. Presently, the rule in Massachusetts is that the use of affidavits in lieu of oral testimony is discretionary with the trial judge. *Commonwealth v. Coggins*, 324 Mass. 552 (1949). The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate by the trial judge. See Mass. R. Crim. P. 30(c)(3).

## Subdivision (c)

The provision of Mass. R. Crim. P. 32, relative to service and notice, are incorporated by this subdivision.

## Subdivision (d)

This provision is paralleled in subdivision (c)(7) of Mass. R. Crim. P. 30 and is intended to expedite the disposition of motions for post-conviction relief.

# Rule 30: Postconviction Relief

## (a) Unlawful Restraint

Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

## (b) New Trial

The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

## (c) Post Conviction Procedure

### *(1) Service and Notice*

The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

## *(2) Waiver*

All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

## *(3) Affidavits*

Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may on rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

## *(4) Discovery*

Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

## *(5) Counsel*

The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

## *(6) Presence of Moving Party*

A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

## *(7) Place and Time of Hearing*

All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

## *(8) Appeal*

An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

- (A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.
- (B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

## *(9) Appeal Under G. L. c. 278, § 33E*

If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

## Rule History

*Amended effective April 14, 1995; amended September 6, 2001, effective October 1, 2001.*

## Reporter's Notes

### *(2001)*

This rule, which marks a significant departure from prior Massachusetts practice, is derived from a number of sources. See Fed. R. Crim. P., Rules 33, 35; ABA Standards Relating to Post-Conviction Remedies (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) Rule 632 (1974).

The moving party is to seek post conviction relief from the trial judge presiding at the initial trial. See *Commonwealth v. Sullivan*, 385 Mass. 497, 498 n. 1 (1981) (the judge who

presided at a defendant's trial normally should hear that defendant's motion for a new trial). The trial judge is familiar with the case which "may make for more efficient handling." ABA Standards, *supra*, § 1.4, comment at 30. See *McCastle*, Petitioner, 401 Mass. 105, 107 (1987) (Rule 30 "assigns the motion to the trial judge who heard the case, on the theory that [the judge's] familiarity with the case can assist in its effective handling.") However, for this same reason the trial judge may bring to the hearing a prejudice that another judge would not have. Recusal of the trial judge should thus be liberally exercised, particularly where it is requested by the moving party. See ABA Standards, *supra*, § 1.4(c). A second advantage to be gained from giving the trial court original jurisdiction to hear post conviction motions is that the necessary witnesses, if any, are likely to be convenient to the court.

## Subdivision (a)

When originally adopted in 1979, this subdivision consolidated the previously distinct procedures of habeas corpus and writ of error. The purpose of the revision was to simplify post conviction procedure, while maintaining the full scope of relief previously available. See ABA Standards Relating to Post-Conviction Remedies § 1.1 (Approved Draft, 1968). However, the writ of habeas corpus still has limited application in cases contending that the term of a lawfully imposed sentence has expired and basing a claim for relief on grounds distinct from issues arising at the indictment, trial, conviction or sentencing stages. See e.g., *Averett*, Petitioner, 404 Mass. 28, 30 (1988) (forfeiture of good time credits). A petition for a writ of habeas corpus is appropriate only where the petition alleges that the petitioner is entitled to immediate release. See *Stewart*, Petitioner, 411 Mass. 566, 568 (1991). On the other hand, a rule 30 (a) motion is not available to contest the legality of a sentence that the defendant has already completed. Cf. *Commonwealth v. Lupo*, 394 Mass. 644, 646 (1985) ("Rule 30 [a] is intended primarily to provide relief for defendants incarcerated in violation of Federal law or of the laws of the Commonwealth.")

In addition to permitting convicted defendants to seek release from illegal confinement or other restraint on their liberty, this subdivision permits them to seek the correction of an illegal sentence. A distinction is drawn between an illegal sentence and a sentence imposed in an illegal manner. See Fed. R. Crim. P., Rule 35.

The concepts of an illegal sentence and an illegally-imposed sentence are narrow and permit the trial judge no discretion in the decision to modify a sentence. Both concepts presume that a defendant's conviction is in all ways valid and that only the sentence is in some manner defective. The difference between the two is that an illegal sentence is one that is not permitted by law for the offense committed by the defendant, e.g., a sentence that exceeds the permissible maximum. See e.g., *Commonwealth v. Ambers*, 397 Mass. 705 (1986) (challenge to legality of consecutive sentences); *Commonwealth v. Harris*, 23

Mass. App. Ct. 687, 691-92 (1987) (court sentenced defendant for an offense other than that for which the jury convicted). Illegality has been held to include not only facially illegal sentences, but sentences premised upon a major misunderstanding by the sentencing judge as to the legal bounds of the judge's authority. E.g., *United States v. Lewis*, 392 F.2d 440 (4th Cir. 1968) (sentencing judge believed parole permissible upon imposition of maximum sentence); *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) (sentence constituted penalty upon exercise of defendant fifth amendment rights); *Robinson v. United States*, 313 F.2d 817 (7th Cir. 1963) (sentencing judge recommended parole when defendant ineligible). An illegally-imposed sentence is one where the irregularity lies with the procedure employed in imposing the sentence. See e.g., *Hill v. United States* 368 U.S. 424 (1962), where the trial court denied the defendant his right of allocution, which was held to be a procedural irregularity. In the context of a probation revocation order, a motion under Rule 30(a) would be appropriate only as a vehicle for challenging the legality of the sentence the defendant received and not the legality of the order revoking probation. Irregularities in the probation revocation process should be challenged through a direct appeal. See *Commonwealth v. Christian*, 429 Mass. 1022 (1999).

An illegal sentence must be corrected by the court at any time upon proper motion by the defendant. An illegally-imposed sentence can only be corrected upon a motion filed within the time permitted by Mass. R. Crim. P., Rule 29(a), that is, within 60 days after imposition. See Rules of Criminal Procedure (ULA) Rule 632 (1974). The only restriction upon the correction of an illegal sentence is that it cannot be increased if it has been partially executed. See *United States v. Benz*, 282 U.S. 304 (1931).

## Subdivision (b)

This subdivision was taken primarily from Fed. R. Crim. P., Rule 33. The standard established in the first sentence is, however, taken directly from former G.L. c. 278, § 29 (St. 1966, c 301).

Prior to 1964 a motion for a new trial under G.L. c. 278, § 29 could only be granted within one year after the end of the trial. See *Fine v. Commonwealth*, 312 Mass 252 (1942); *Commonwealth v. Sacco*, 261 Mass 12 (1927). However, a 1964 amendment rewrote the statute so that the court could consider such a motion filed at any time after judgment. St. 1964, c. 82.

In the absence of constitutional error, whether to grant a motion for a new trial on an issue that has been properly presented to the court is within the sound discretion of the trial judge. See *Commonwealth v. Smith*, 381 Mass. 141, 142 (1980). The basis for a new trial can either relate to the conduct of the trial, see e.g., *Commonwealth v. Vaidulas*, 433 Mass.



247, 250 (2001) (“The only means of revisiting after trial a matter raised in a motion in limine is through a motion for postconviction relief under rule 30.”); *Commonwealth v. Francis*, 411 Mass. 579, 585-86 (1992) (improper jury instruction); *Commonwealth v. Westmoreland*, 388 Mass. 269, 271 (1983) (ineffective assistance of counsel); *Commonwealth v. Schand*, 420 Mass. 783, 787-88 (1995) (prosecutor’s failure to disclose exculpatory evidence); *Commonwealth v. Nickerson*, 388 Mass. 246, 249-250 (1983) (defendant’s mental incompetence); *Commonwealth v. Ciminera*, 11 Mass. App. Ct. 101, 107-110, *aff’d* 384 Mass. 807 (1981) (jury misconduct), or to the discovery of new facts that bear on the question of guilt, see e.g., *Commonwealth v. Pires*, 389 Mass. 657, 664-666 (1983) (newly-discovered evidence); *Commonwealth v. Watson*, 377 Mass. 814, 815 (1979) (recanted testimony).

A defendant seeking a new trial on the basis of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction. See *Commonwealth v. Pike*, 431 Mass. 212, 218 (2000). The allegedly new evidence must be material and credible, and “carry a measure of strength in support of the defendant’s position.” *Commonwealth v. Grace*, 397 Mass. 303, 305-06 (1986). A defendant must also show that the evidence was unknown to the defendant or the defendant’s counsel, and not discoverable through “reasonable pretrial diligence” at the time of trial or at the time of the presentation of any earlier motion for a new trial. See *Pike*, 431 Mass. at 218. “The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury’s deliberations. This process of judicial analysis requires a thorough knowledge of the trial proceedings and can, of course, be aided by a trial judge’s observation of events at trial.” *Commonwealth v. Moore*, 408 Mass. 117, 126-27 (1990) quoting *Commonwealth v. Grace*, 397 Mass. 303, 305-06 (1986).

A new trial motion under Rule 30(b) is the appropriate vehicle to attack the validity of a guilty plea or an admission to sufficient facts. See *Commonwealth v. Fanelli*, 412 Mass. 497 (1992) (treating the defendant’s postsentence motion to withdraw guilty pleas as a motion for a new trial pursuant to Mass. R. Crim. P. 30); *Dunbrack v. Commonwealth*, 398 Mass. 502 (1986) (the appropriate method for attacking the lawfulness of the admission to sufficient facts and the sentence imposed is a postconviction motion for new trial pursuant to rule 30 (b) and not a petition under c. 211 § 3). A Rule 30(b) motion is also appropriate where the defendant has been deprived of a constitutionally protected right by counsel’s failure to appeal. See *Commonwealth v. Cowie*, 404 Mass. 119, 121 (1989). However, granting a new trial because the verdict is against the weight of the evidence should be done according to Rule 25(b)(2), not Rule 30. See *Commonwealth v. Preston*, 393 Mass. 318, 324 (1984).

The requirement that the trial judge make findings upon a motion for a new trial is contrary to the traditional rule in the Commonwealth, see *Commonwealth v. Morgan*, 280 Mass 392 (1932), but is based upon the following language of the court in *Earl v. Commonwealth*, 356 Mass 181 (1969):

*We recognize that the single justice has power to entertain writs of error in such cases but it is preferable that these questions be resolved in the first instance by the trial judge upon a motion for new trial. The effect of this practice will be to place in the hands of the trial judge, rather than in the hands of the single justice, the task of resolving factual disputes underlying alleged constitutional errors.*

Id. at 183. Accord, *Commonwealth v. Penrose*, 363 Mass 677 (1973). Cf. *Commonwealth v. Preston*, 393 Mass. 318, 323 n. 4 (1984) (declining to address the issue whether findings are required in response to all rule 30 (b) motions regardless of outcome). The absence of a finding of fact hampers appellate review of the judge's decision on a new trial motion. See e.g., *Commonwealth v. Caban*, 48 Mass. App. Ct. 179, 184 (1999) (remanding case for finding of fact).

General Laws c. 279, § 41 provides that judgment should be entered against a corporation that fails to appear in court to answer charges against it. If the corporation can later show cause to excuse its prior neglect, it should be permitted to have the prior judgment vacated upon a motion for a new trial.

The original Reporter's Notes to Rule 30 intended that the remedy available under this subdivision be truly post-conviction, that is, not open to a defendant until the validity of the finding or verdict of guilt was conclusively established by an appellate court if an appeal was taken. This policy was designed to avoid complex and duplicitous proceedings and to protect the interests of the defendant, who is ordinarily limited to a single motion for a new trial. In the years since this subdivision was first promulgated, however, it has not been unusual for defendants to file a rule 30(b) motion after a notice of appeal has been filed. If the motion is pending at the time the appeal is entered, counsel then request a stay of the appeal until the motion is disposed of so that any appeal from the ruling can be consolidated with that from the judgment. See *Commonwealth v. Powers*, 21 Mass. App. Ct. 570, 572 n. 2 (1986). The Supreme Judicial Court has recognized that a judge may rule on a new trial motion prior to the determination of an appeal from the conviction. See *Commonwealth v. Hallet*, 427 Mass. 552, 555 (1998) (describing considerations a judge should take into account in deciding whether to rule on the merits of a new trial motion presented prior to the determination of an appeal); *Commonwealth v. Smith*, 384 Mass. 519, 524 (1981) ("defendant's appeal from his conviction should, when possible, be combined for review with his appeal from the denial of any motion for a new trial")

This rule does not limit access of a criminal defendant to review pursuant to G.L. c. 211, § 3, which grants the Supreme Judicial Court “general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided . . . .” That power, however, should be and has been exercised only in exceptional circumstances, when necessary to protect substantive rights. See *McGuinness v. Commonwealth*, 420 Mass. 495, 497 (1995); *Forte v. Commonwealth*, 418 Mass. 98, 99 (1994); *Commonwealth v. McCarthy*, 375 Mass. 409, 414 (1978) and cases cited.

## Subdivision (c)

### **(c)(1)**

In 2001, this subsection was amended to eliminate the requirement that the Attorney General be served in every case where a motion is filed under Rule 30(a). The subsection now requires service of a motion for a new trial, under either subsection (a) or subsection (b), upon the office of the prosecutor who represented the Commonwealth in the trial court, whether a District Attorney’s Office or the Attorney General’s Office. The prosecutor’s office which maintains the original trial file is in the best position, and is responsible for, responding to motions for a new trial.

### **(c)(2)**

Subdivision (c)(2) was modeled after Me. Rev. Stat. Ann., tit. 14 § 5507 (1964), and was intended to establish finality of convictions and to eliminate “piecemeal litigation . . . whose only purpose is to vex, harass, or delay.” *Sanders v. United States*, 373 US 1, 18 (1963). See *Commonwealth v. Donahue*, 6 Mass. App. Ct. 971 (1979) (defendant’s fourth motion for new trial). This rule is not intended to foreclose from future consideration grounds which were not known and could not have been found out with the exercise of due diligence. The constitutionality of the Maine statute from which this subdivision is taken was upheld by the Supreme Court in *Murch v. Mottram*, 409 U.S. 41 (1972). See ABA Standards Relating to Post Conviction Remedies § 6.2(b)(i) (Approved Draft, 1968).

The rule of waiver established in the subdivision applies, as a result of case law, to claims that were not preserved at trial or not raised in an appeal, as well as to claims that were not put forward in a prior new trial motion. See *Rodwell v. Commonwealth*, 432 Mass. 1016, 1017 (2000) (“If a defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for postconviction relief, the claim is waived.”); *Commonwealth v. McLaughlin*, 364 Mass. 211, 229 (1973), quoting from *Commonwealth v. Dascalakis*, 246 Mass. 12, 24 (1923) (“It has been the unbroken practice both under the statute [former G.L. c. 278 § 29 on which Rule 30 was based] and at common law respecting motions for new trial not to examine anew the original trial for the

detection of errors which might have been raised by exceptions taken at the trial.”) Waiver applies equally to constitutional and non-constitutional claims. See *Commonwealth v. Deeran*, 397 Mass. 136, 139 (1986).

Where a new trial motion presents a claim that could have been raised at trial but was not, the discretion a judge has to entertain the issue, as well as the scope of appellate review of the judge’s decision, differs depending on the timing of the motion. Where the motion is presented to the court prior to the determination of an appeal, the motion judge, especially if the judge presided over the original trial, has wide discretion to consider an issue that was not raised at trial. See *Commonwealth v. Hallet*, 427 Mass. 552, 554-55 (1998). If the judge does consider the issue on its merits, it opens the issue up to full appellate review. *Id.* If the judge does not consider the issue on the merits, however, and denies relief based on the waiver doctrine, the standard on appellate review is confined to whether there was a substantial risk of a miscarriage of justice. *Id.* at 554. A judge should take into account in deciding to deny a new trial motion on the merits rather than on the basis of waiver, the advantage and disadvantage of making full appellate review available. *Id.*

Since it affects the scope of appellate review, if the judge is going to deny the motion, the judge should make clear whether the decision is based on a consideration of the merits, or on the basis that the error did not raise a substantial risk of a miscarriage of justice—which is the standard for considering issues that have been waived because they were not preserved at trial. See *id.* at 555. (“The judge should recognize that, unless the asserted error concerns a manifest injustice or created a substantial risk of a miscarriage of justice, she has wide discretion whether to consider any new trial issue fully on its merits.”) Cf. *Commonwealth v. Depace*, 433 Mass. 379, 382 n.2 (2001) (where the judge considered the matter only on the threshold question whether the defendant raised a substantial issue necessitating an evidentiary hearing, the issue was not preserved for full appellate review); *Commonwealth v. Oliveira*, 431 Mass. 609, 612 (2000) (where the judge considered the matter only to determine if the issue raised an asserted error that created a substantial risk of a miscarriage of justice, the issue was not preserved for full appellate review).

If a new trial motion is presented after an appeal has been decided, the discretion the judge has to consider an issue that could have been raised earlier, is much more limited. In this posture, the Supreme Judicial Court has recommended restricting consideration of such ordinarily waived issues to “those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result.” *Commonwealth v. Watson*, 409 Mass. 110, 112 (1991). In determining if a substantial risk of a miscarriage of justice warrants the judge in considering a claim that would otherwise be precluded because it was not raised earlier, the judge should take into account three factors, taken from

Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 21 n.22 (1986): whether there is a genuine question of guilt or innocence; whether the error was significant enough in the context of the trial to make it plausible to infer that the result might have been different but for the error; and, whether counsel's failure to object at trial was simply a reasonable tactical decision. See Commonwealth v. Amirault, 424 Mass. 618, 647 (1997). However, where a new trial motion raises an issue for the first time whose constitutional significance was not established until after the trial and appeal, so that the defendant did not have a genuine opportunity to preserve the issue in the normal course of events, the judge may consider it. See Commonwealth v. Burkett, 396 Mass. 509, 511 (1986). The standard of review from the denial of a new trial motion filed after an appeal has been decided is the same whether the motion judge considered the issue or not, whether there was a substantial risk of a miscarriage of justice. See Commonwealth v. Curtis, 417 Mass. 619, 624 n. 4 (1994).

### **(c)(3)**

The primary purpose of subdivision (c)(3) is to encourage the disposition of post conviction motions upon affidavit. In accordance with prior practice, see Commonwealth v. Hubbard, 371 Mass 160, 174 (1976) quoting Commonwealth v. Coggins, 324 Mass 552, 556-57, cert. denied, 338 US 881 (1949), such motions should ordinarily be heard on the facts as presented by affidavit, although in particular circumstances, the judge may in the exercise of discretion receive oral testimony. See Commonwealth v. Figueroa, 422 Mass. 72, 77 (1996) (the decision whether to hold an evidentiary hearing on a new trial motion under Rule 30 is within the sound discretion of the judge). Where a substantial issue is raised, however, the better practice is to conduct an evidentiary hearing. See Blackledge v. Allison, 431 US 63, 75-76 (1977). Compare Commonwealth v. Licata, 412 Mass. 654, 660 (1992) (error to refuse a hearing on new trial motion which raised a substantial issue of ineffective assistance of counsel) with Commonwealth v. Stewart, 383 Mass. 253, 257 (1981) (not error to refuse a hearing on new trial motion which failed to raise substantial issue concerning perjury by prosecution witness). In determining whether the motion raises a substantial issue which merits an evidentiary hearing, the judge should look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing. See *id.* at 257-58. Whether or not a substantial issue is presented must, of course, be determined on the face of the motion and affidavit. The motion should specify the grounds for relief, see Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 407 (1983), and the affidavit should provide the factual support necessary to determine the issue. The court is fully warranted in dismissing a motion unaccompanied by affidavit, see Commonwealth v. Colantonio, 31 Mass. App. Ct. 299, 302 (1991); or one whose the factual allegations are "obscure," cf. Sayles v. Commonwealth, 373 Mass 856 (1977), "impressionistic and

conclusory,” cf. *Commonwealth v. Coyne*, 372 Mass. 599, 600 (1977), or untrustworthy, see *Commonwealth v. Lopez*, 426 Mass. 657, 662 (1998).

The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate by the trial judge.

**(c)(4)**

Discovery in the context of a new trial motion is not a matter of right. The motion must first establish a *prima facie* case for relief before discovery is available. However, where that hurdle is met and discovery would be appropriate to develop facts necessary to support the claim, it is within the judge’s discretion to allow discovery. Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief. Cf. *Harris v. United States*, 394 U.S. 286, 300 (1969). This subsection provides that the Commonwealth, as well as the defendant, may obtain discovery. Cf. Rules Governing §2254 Cases in the United States District Courts, Rule 6(c) (recognizing the right of the respondent in a habeas corpus case to take the deposition of the petitioner). If, upon completion of discovery, the defendant is totally unable to make a reasonable proffer of evidence on a crucial element of the case, no hearing need be held and the motion may be dismissed.

In 2001, this subsection was amended to eliminate confusion arising from the reference to discovery in civil cases. The judge has wide discretion to allow the appropriate form of discovery, see *Commonwealth v. Stewart*, 383 Mass. 253, 261 (1981), which may include orders to produce evidence or statements, as provided in the Rules of Criminal Procedure, and in an unusual case may include depositions or other modes of discovery provided in the Rules of Civil Procedure. Where necessary, a party subject to discovery may seek an appropriate protective order.

In 2001, this subsection was also amended to require the opposing party to receive notice and an opportunity to be heard before the judge grants a discovery request. This provision is particularly important in the context of a request that evidence in the possession of the Commonwealth be made available to the defendant for scientific testing, such as DNA analysis. Before ordering such discovery, the judge must take into account a number of issues whose resolution requires the Commonwealth’s participation, including the potential relevance of the results to the ground the motion advances for a new trial, the feasibility of successful testing, and the details of access to and testing of the evidence. See generally National Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* (Nat’l. Inst. Justice 1999) at 52-53.

**(c)(5)**

As a matter of constitutional obligation, the state need only ensure that indigent defendants have meaningful access to whatever post conviction proceedings are generally available. See *Commonwealth v. Conceicao*, 388 Mass 255 (1983). Counsel is not necessary in every case to ensure that end. *Id* at 261. The decision whether to appoint counsel on a motion for a new trial is within the discretion of the trial judge. However, where the motion raises a meritorious, or even colorable claim, “it is much the better practice to assign counsel.” *Id* at 262. G.L. c. 211D §14 provides for the Committee for Public Counsel Services to represent indigent defendants in post conviction proceedings, and judges may refer requests for counsel to the Committee for initial screening.

If the motion is frivolous, repetitive, or the issues are so simple and easy that an attorney is not necessary to elucidate them, the judge may deny a motion for the appointment of counsel. See *Conceicao*, *supra*, 388 Mass. at 261-62. Where the motion is presented to the trial judge, the judge may take into account the fact of familiarity with the original record, or with that in prior new trial motions, in declining to appoint counsel. *Id* at 261.

By amendment in 2001, this subsection gave judges discretion to allow for the payment of costs associated with the preparation and presentation of a new trial motion. Such costs may include the preparation of a transcript, obtaining the services of an investigator, retaining the services of an expert, or paying for scientific testing. As with the decision to appoint counsel, there is no constitutional right to have the state pay for these types of costs associated with a new trial motion. See *Commonwealth v. Davis*, 410 Mass. 680, 684 n. 7 (1991). But where the defendant seeks costs that are reasonably necessary to develop support for a well founded basis for granting a new trial, it is appropriate for the judge to exercise discretion and allow the request. In making the decision to allow costs associated with a new trial motion, the judge should take into account the likelihood that the expenditure will result in the defendant’s being able to present a meritorious ground for a new trial. Where the request concerns scientific testing of evidence in the Commonwealth’s possession, as with DNA analysis, the court should consider a request for funds in conjunction with the appropriate discovery motion under subsection (c)(4) seeking access to the evidence in question.

By amendment in 2001, this subsection required that the Commonwealth be given notice and an opportunity to be heard with respect to a request for costs in connection with a new trial motion. Unlike a request for costs prior to trial, in the context of a new trial motion there is no reason to deny the Commonwealth an opportunity to participate in a hearing on this type of request in order to avoid the prejudice that can result from the defendant’s being forced to reveal trial strategy prematurely. Cf. *McKinney v. Paskett*, 753 F. Supp. 861,

864 (D.C. Id. 1990). The sound exercise of a judge's discretion to allow the defendant costs will depend in part on an evaluation of the legal theory which the expenditure of funds would support. The Commonwealth's participation in this process will result in a better informed decision. This subsection, however, does not give the Commonwealth a right to participate in the determination of a request for the initial appointment of counsel.

### **(c)(6)**

Subdivision (c)(6) was originally taken from 28 USC § 2255 (1949) and authorizes the court to make a determination—with or without a hearing—without requiring the presence of the moving party.

The defendant's presence is not required at a hearing on a motion for a new trial. See *Commonwealth v. Owens*, 414 Mass. 595, 604 (1993) citing *Commonwealth v. Costello*, 121 Mass. 371, 372 (1876). Where the defendant's presence will be of little help to the court—e.g., at the determination of purely legal issues—a proper determination can be made in his absence. *Sanders v. United States*, 373 U.S. 1, 21 (1963); *Howard v. United States*, 274 F.2d 100, 104 (8th Cir. 1960). See Mass R. Crim. P., Rule 18 and Reporters' Notes. It is therefore appropriate to screen post-conviction motions carefully, and to utilize other than summary disposition only where an evidentiary hearing to resolve factual issues requires the presence of the defendant. ABA Standards Relating to Post-Conviction Remedies § 4.5(a); § 4.6, commentary at 74-75 (Approved Draft, 1968).

### **(c)(7)**

This subdivision is designed to expedite the determination of motions filed pursuant to this rule. In 2001, it was amended to give the parties at least 30 days notice of a hearing on a new trial motion, unless the judge determines that good cause exists to order the hearing held sooner. In light of the fact that the Commonwealth need not respond to every new trial motion, since some may be denied on their face as without merit, the primary objective of this provision is to avoid the problem of having the Commonwealth placed in the position of having to respond to a new trial motion without adequate time to prepare.

### **(c)(8) & (c)(9)**

Subdivision (c)(8) was originally patterned after Cal. Penal Code § 1506 (Deering Supp 1976).

Appeals from new trial motions in cases subject to G.L. c. 278 § 33E go to the Supreme Judicial Court. In all other cases, the Appeals Court is the appropriate venue. Either party may appeal from an adverse determination on a new trial motion. A ruling in favor of a defendant on a motion for relief from unlawful restraint or for a new trial pursuant to this rule does not preclude a Commonwealth appeal, since a successful appeal would merely



reinstate the verdict or finding of guilt and would not subject the defendant to re-prosecution or multiple punishment. *United States v. Wilson*, 420 U.S. 332 (1975).

A defendant's request for release on bail pending appeal is a matter within the discretion of the trial judge. See *Forte v. Commonwealth*, 418 Mass. 98, 100 (1994). However, the provision giving the judge discretion to release a defendant on bail pending appeal applies only to appeals from an order for a new trial or an order determining that the defendant's sentence should be reduced to a term of imprisonment less than the time he already has served. See *Stewart v. Commonwealth*, 413 Mass. 664 (1992).

Under subdivisions (c)(8)(B) and (c)(9), the appellate court is to determine the defendant's costs of appeal which are then to be paid to the defendant by the Commonwealth on the order of the trial court. In 1995, the Standing Advisory Committee on Criminal Procedure reconsidered the several rules concerning the payment of reasonable attorney's fees to insure that they were consistent. In *Latimore v. Commonwealth* 417 Mass 805 (1994), the Commonwealth filed an application for leave to appeal the allowance of the defendant's motion for a new trial under the provisions of G.L. c. 278 § 33E. The application was denied by the single justice and the defendant moved for costs and attorney's fees. Because the application for appeal in a capital case was controlled by section 33E, rather than Rule 30(c)(8)(B), no specific provision for payment of fees and costs were available. The court observed that this situation, while rare, presented an anomaly in the rules.

The committee reconsidered the appropriate rules and added language to address the situation where the Commonwealth is making application for leave to appeal and adds directions for payment of fees and costs upon the denial of the application.

The Single Justice in the Memorandum of Decision in the County Court in *Commonwealth v. Latimore*, Supreme Judicial Court for Suffolk Co. 92-0469 said that in appropriate circumstances he would read the authority granted to the Appeals Court to include the Supreme Judicial Court. To confirm this authority to include both appellate courts, Rule 30(c)(8)(B) was amended to specifically include both courts.

The specific shortcoming of the rules addressed in *Latimore* was corrected by the addition of Rule 30(c)(9) which provides the Supreme Judicial Court with authority to award fees and costs in capital cases under the provision of G. L. c. 278, § 33E.

# Rule 31: Stay of Execution; Relief Pending Review Automatic Expiration of Stay

(Applicable to Superior Court and de novo trials in District Court)

## (a) Imprisonment

If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or, pursuant to Mass. R. App. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal. If execution of a sentence of imprisonment is stayed, the judge or justice may at that time make an order relative to the custody of the defendant or for admitting the defendant to bail.

## (b)

If the application for a stay of execution of sentence is allowed, the order allowing the stay may state the grounds upon which the stay may be revoked and, in any event, shall state that upon release by the appellate court of the rescript affirming the conviction, stay of execution automatically expires unless extended by the appellate court. Any defendant so released shall provide prompt written notice to the clerk of the trial court regarding the defendant's current address and promptly notify the clerk in writing of any change thereof. The clerk shall notify the appellate court that will hear the appeal that a stay of execution of sentence has been allowed. At any time after the stay expires, the Commonwealth may move in the trial court to execute the sentence. The court shall schedule a prompt hearing and issue notice thereof to the defendant unless the prosecutor requests, for good cause shown, that a warrant shall issue.

## (c) Fine

If a reservation, filing, or entry of an appeal is made following a sentence to pay a fine or fine and costs, the sentence shall be stayed by the judge imposing it or by a single justice of the court that will hear the appeal if there is a diligent perfection of appeal.

## (d) Disposition Other Than Imprisonment or Fine

A judge in the exercise of discretion may stay an order imposing a disposition other than immediate imprisonment or a fine if an appeal is taken.

### Rule History

*Amended June 24, 2009, effective October 1, 2009; amended February 22, 2022, effective April 1, 2022.*

### Reporter's Notes

#### (2022)

The amendment to Rule 31(d) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020). The amendment also clarifies that any non-imprisonment disposition may be stayed, including an order imposing probation or a continuance without a finding.

#### (2009)

This Rule was revised in 2009. As originally adopted in 1979, it codified existing practice under G.L. c. 279 § 4, which governed the procedure for a stay of execution pending appeal prior to the adoption of the Rules of Criminal Procedure.

#### Subdivision (a)

Practice in the Commonwealth is that sentences are not routinely stayed pending appeal. See *Hagen v. Commonwealth*, 437 Mass. 374, 378 (2002). However, where a defendant meets the appropriate requirements, it has been a long standing tradition to grant a stay in the interest of justice, to avoid imprisoning one whose conviction may not survive appellate review. See *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 513 (1979).

A judge should order a stay only when the defendant has met the two concerns which guide the exercise of discretion in this area. The first and most important is the likelihood of the defendant establishing on appeal that the conviction will be overturned. Cf. *Commonwealth v. Stewart*, 413 Mass. 664 (1992) (bail pending appeal is not appropriate if the only consequence of the defendant’s success would be reducing the term of his sentence and not immediate discharge). This requirement does not demand that the defendant establish that the appeal is more likely than not to be successful, only that it presents “an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.” See *Commonwealth v.*

Hodge, 380 Mass. 851, 855 (1980); Commonwealth v. Allen, 378 Mass. 489, 498 (1979). In this respect, the Massachusetts practice is more liberal than its federal counterpart. Compare 18 U.S.C. 3143(b)(1)(B) (the defendant must establish that the appeal “raises a substantial question of law or fact likely to result in” a favorable outcome).

The other factor that informs a judge’s exercise of discretion in granting a stay is the question of security: whether the defendant will flee, commit another crime or present a danger to the community. See Hodge, 380 Mass. at 855. The same facts that are relevant to the decision to grant a defendant bail prior to trial are pertinent in this context as well. See Allen, 378 Mass. at 498.

In granting a stay, a judge may impose appropriate conditions on the defendant’s release. Cf. Commonwealth v. Beauchemin, 410 Mass. 181, 186 (1991) (defendant not leave his home and have no minor visitors). G.L. c. 276 § 87 can be used as a vehicle for having the probation department monitor the defendant’s conduct during a stay.

The trial judge may entertain a motion for a stay either before or after the entry of an appeal. Whether the judge grants or denies the motion, no statement of reasons is necessary nor must the judge make any particular finding or certification. See Allen, 378 Mass. at 1034.

This Rule does not address stays of execution of a sentence when an appeal is not pending. See Commonwealth v. McLaughlin, 431 Mass. 506, 518 (2000) (raising but not deciding the question of a judge’s inherent power to stay a sentence for other reasons).

Appellate Rule 6 establishes the procedure that is available after the trial judge acts on a motion for a stay. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge’s decision to deny, e.g., Commonwealth v. Aviles, 422 Mass. 1008 (1996), or grant, e.g. Commonwealth v. Hodge, 380 Mass. 851 (1980), a stay. In the ordinary course of events, for all but first degree murder cases a single justice of the Appeals Court is the appropriate forum.

## Subdivision (b)

Stay orders must inform the defendant of the conditions upon which they were issued. Mandatory conditions include the defendant’s continuing obligation to provide the court in writing with a current address and to prosecute the appeal in a diligent manner. See Mass. R. A. P. 6 (b)(4). The court should craft whatever additional conditions are appropriate to each case.

The stay automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court states otherwise. A rescript is

“released” when it is announced to the public and the appellate court notifies the parties that the court has decided the case. Cf. Mass. R. App. P. 23 (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript “issues” twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. *Id*

The court that decided the appeal may exercise its discretion to extend a stay of execution pending a petition for rehearing, application for further appellate review, or petition for certiorari. Unless otherwise specified, an extended stay expires when the rescript issues. The appellate court may act sua sponte or pursuant to the defendant’s motion, which may be filed before the appeal is decided or after the rescript is released. If the appeal is lodged in the Appeals Court, the defendant should file the motion with the panel that has the responsibility for deciding the merits of the appeal.

In order to ensure that the clerk of the appellate court can notify the parties that a stay has automatically expired, see Mass. R. App. P. 6 (b)(6), the clerk of the trial court must notify the appellate court whenever a stay is granted.

Once a rescript affirming the conviction is released, the burden is on the Commonwealth, not the defendant, to initiate the process for the sentence to be executed. See *Commonwealth v. Ly*, 450 Mass. 16, 20 (2007). This requires the prosecutor to file a motion with the trial court and for the court to schedule a hearing and notify the defendant. The court should schedule the hearing promptly. *Id.* at 22. If possible, the prosecutor should agree on a date for the hearing with the defendant’s current counsel (in most cases that will be the lawyer who represented the defendant on appeal). The procedure for ensuring the defendant’s appearance at the hearing to execute the sentence is modeled after the one described in Rule 6 (a). Ordinarily, the court should simply issue a notice to the defendant of the time and date of the hearing. The prosecutor, however, may accompany the motion for a hearing with a request that the court issue a warrant for the arrest of the defendant. If the prosecutor’s submission establishes good cause to believe that a warrant is necessary in order to ensure the defendant’s appearance, the court may order the defendant’s arrest. The defendant is not entitled to be heard on the question of whether a warrant should issue.

## Subdivision (c)

This subdivision departs from federal rule in that a stay of the payment of a fine is mandatory under this rule. This provision was adopted in recognition of the difficulty a

defendant has, upon the successful appeal of his judgment, in recovering money he has paid in satisfaction of a fine.

### Subdivision (d)

This subdivision was originally based, in part, on Fed. R. Crim. P. 38(a)(4) and upon G.L. c. 279 § 4.

## Rule 32: Filing and Service of Papers

(Applicable to District Court and Superior Court)

### (a) Service: When Required

Written motions other than those which are heard ex parte, written notices, and similar papers shall be served upon each of the parties.

### (b) Service: How Made

Whenever under these rules or by order of court service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney, unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for in civil actions.

### (c) Notice of Orders and Judgments

If upon the entry of a judgment or order made on a written motion either or both of the parties are not present in court, the clerk shall immediately mail to the absent party or parties a notice of that entry and shall record the mailing in the docket.

### (d) Filing

Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided for in civil actions.

### (e) Additional Time After Service by Mail

Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

## (f) Protection of Personal Identifying Information

Publicly accessible documents filed with the court shall conform to Supreme Judicial Court Rule 1:24, Protection of Personal Identifying Information in Publicly Accessible Court Documents.

## Rule History

*Amended January 25, 2017, effective February 1, 2017.*

## Reporter's Notes

This rule is closely patterned after Fed. R. Crim. P. 49. Subdivisions (a), (b) and (d) are identical to their federal counterparts and subdivision (c) has been adopted with slight revision. Subdivision (e) has been taken from Fed. R. Crim. P. 45(e) and Mass. R. Civ. P. 6(d).

### *Subdivision (a)*

This subdivision is similar to Fed.R.Civ.P. and Mass. R. Civ. P. 5(a). Service is required “upon each of the parties” to avoid the interpretive questions that arose under the “adverse party” language of the federal rule prior to its 1966 amendment, such as the problem of when is a co-defendant an adverse party. The rule is also designed to promote full exchange of information among all parties. However, no restriction is intended upon agreements among co-defendants or between the defendant and the prosecutor restricting unnecessary expense. Advisory Committee note to Rule 49.

Service is required of motions, notices and similar papers. The latter category embraces opposing affidavits and the like. But this rule does not apply to service of a summons for a witness under Mass. R. Crim. P. 17, or the execution or service of a warrant or summons under Mass. R. Crim. P. 6. See 8B J. Moore, Federal Practice para. 49.02 (1978 rev.).

### *Subdivision (b)*

The first sentence of this subdivision is the same as the first sentence of Mass. R. Civ. P. 5(b) and Fed. R. Civ. P. 5(b). When a party has appeared and is represented by an attorney, service is required to be made upon the attorney, unless the court orders service to be made upon the party himself in cases where the court deems such service necessary. An order, disobedience of which is punishable as a contempt, or an order to show cause why a party should not be punished for contempt, are papers which the court would, as a practical matter, generally order to be served upon the party himself. A civil contempt proceeding, however, is merely a continuance of the original action and a step in the

enforcement of a previous order or judgment, so that service of papers to have a party adjudged in civil contempt may validly be made on his attorney of record, unless it is unreasonable to regard the attorney as a representative of the party at that time. 2 J. Moore, Federal Practice para. 5.06 (2d ed. 1978).

The second sentence of Mass. R. Crim. P. 32(b) incorporates by reference Mass. R. Civ. P.4.

### *Subdivision (c)*

This subdivision is similar to Fed. R. Crim. P. 49(d) as it appeared prior to its 1966 amendment. The federal rule is an adoption for criminal proceedings of Fed. R. Civ. P. 77(d). No consequences are attached to the failure of that clerk to give the prescribed notice. However, it is intended that in a case where the losing party, in reliance upon the clerk's obligation to send a notice, fails to file a timely notice of appeal, the trial judge may, in the exercise of his discretion, vacate the judgment because of the clerk's failure to give notice and may enter a new judgment. The time period for appeal would then begin to run when the second judgment is entered. See *Hill v. Hawes*, 320 U.S. 520 (1944). Since oral motions are generally ruled on in the presence of the parties, there can be no reliance on the clerk's failure to send notice and the applicable time limits for appeal must be observed.

### *Subdivision (d)*

This subdivision incorporates by reference Mass. R. Civ. P. 5(d)-(e), which govern the procedure for filing papers. Under Mass. R. Civ. P. 5(e), papers must be filed with the clerk of the court "except that a judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk."

### *Subdivision (e)*

This subdivision is identical to Mass. R. Civ. P. 6(a) and Fed. R. Civ. P. 6(e) and to Fed. R. Crim. P. 45(e). The reason for this rule is that under Mass. R. Civ. P. 5(b), service by mail is complete upon mailing, and various prescribed time periods begin to run after service of notice or other papers. This subdivision adds three days to these prescribed periods since a day or more may intervene between the mailing of a pleading or paper and the actual receipt thereof.

## **Rule 33: Counsel for Defendants Indigent or Indigent but Able to Contribute**

(Applicable to District Court and Superior Court)



The assignment of counsel for defendants determined to be indigent or indigent but able to contribute shall be governed by the provisions of G. L. c. 211D and Supreme Judicial Court Rule 3:10.

## Rule History

*Amended May 29, 1986, effective July 1, 1986.*

## Reporter's Notes

The Municipal Court for the City of Boston established in 1974 the Marginally Indigent Defendant's Attorneys Program (MIDA). This rule establishes a program of similar content for all District and Superior Courts.

A substantial number of defendants who appear in court to answer to criminal charges are found to be indigent and are provided with the services of counsel at public expense. Others with adequate resources retain private counsel. There is also a middle group composed of defendants who, because their incomes or assets are sufficient to prevent their being classed indigent, but are insufficient to enable them to comfortably retain counsel, are often denied representation.

Many of this latter group are willing to pay for legal services to the extent of their ability, but are frustrated in attempting to retain counsel by their limited means. It has become the practice of many judges, when advised of such defendants' unsuccessful attempts to obtain representation, to assign counsel, thus adding to the cost of administering the public defender programs and to the caseload of Massachusetts Defenders Committee.

It is the intent of this rule that an attorney be provided at a fee which is affordable by a defendant who does not qualify as an indigent, but who nonetheless cannot pay the total expense of a criminal defense without undue hardship. The rule applies only to reduced rates for attorney's fees; it does not apply to other defense services.

Under existing practice there is no system of partial eligibility. It is expected that this rule—which makes competent attorneys available at reduced fees—will serve the dual function of providing defense counsel to a large number of defendants while reducing an unnecessary drain on the public treasury. See ABA Standards Relating to Providing Defense Services § 6.2 (Approved Draft, 1968).

### *Subdivision (a)*

This rule is to be read in conjunction with Mass.R.Crim.P. 8, Assignment of Counsel.

For many years, indigents who have needed attorneys have received the services of volunteers. Many bar associations have assumed the responsibility of providing legal services without charge to those unable to pay for their criminal defense. However, as constitutional considerations have multiplied, an increased number of defendants and an increased number of appearances for each defendant have created a tremendous burden on public revenues. *James v. Strange*, 407 U.S. 128, 141 (1972). It is not the purpose of this rule to deprive any defendant of the services of appointed counsel. Rather, it is recognized that many defendants who receive the services of court-appointed counsel are as able to pay part of their legal expenses as some defendants are to pay the entire expenses of retained counsel.

### *Subdivision (b)*

The referral process for the appointed attorney shall be monitored by either the local bar association or the clerk of the District Court. The list of attorneys should be comprised of those who volunteer and who are qualified to provide competent legal assistance. An established list will better ensure fairness in the distribution of appointments and will “avoid the appearance of patronage.” ABA Standards, *supra* § 2.3.

### *Subdivision (c)*

In determining the eligibility of a defendant for the appointment of counsel under this rule, the court should consider the same relevant factors as mentioned in the Reporter’s Notes to Mass.R.Crim.P. 8: employment status, income, obligations, dependents, etc. See G.L. c. 261, § 27C. The final determination as to the defendant’s eligibility as marginally indigent is within the court’s discretion.

Where special circumstances require, see Mass.R.Crim.P. 8(b), an appointment can be made of an attorney who is not on the list.

It should be clearly understood by both the defendant and the appointed attorney that the established fee is to be the only remuneration for the services rendered. Upon appointment of counsel, a form, which details the required information, is to be signed by the defendant.

Within seven days after entry of judgment or other disposition of the case, the attorney shall complete a report indicating the offense of which the defendant was charged and the fees charged and received.

### *Subdivision (d)*

The defendant is to make the initial contact and it is his responsibility to afford the attorney adequate time for investigation and preparation before trial. If appointed counsel chooses not to, or is unable to, represent the defendant, he is to notify the court and the defendant.

### *Subdivision (e)*

As provided in Mass.R.Crim.P. 8(d), the case may proceed to trial on the set date notwithstanding the fact that the attorney has not been contacted by the accused or has been given insufficient time for preparation.

All parties, unless the attorney has withdrawn his appearance pursuant to subdivision (d), must appear in court on the trial date. If the attorney has properly withdrawn and no continuance has been granted, the defendant must appear in court on the trial date. The case should proceed to trial unless for compelling reasons the court determines that justice requires a continuance. See Mass.R.Crim.P. 9.

### *Subdivision (f)*

Upon appointment of counsel, the defendant should be told that the expense of appointed counsel will be assessed against him as costs, and he should be informed of the possible effects of non-compliance with any court order regarding payment of these costs. To insure that the defendant understands the operation of this rule, the defendant will be required to sign a statement to that effect.

The court should then make an initial estimate of the costs of defense (keeping in mind the maximum established by the District Court and Superior Court Rules and other rules of court that determine the rate of attorneys' compensation) and of the defendant's ability to satisfy all or part of those costs out of present assets and expected earnings. In determining the availability of present assets to meet these costs, the court should consider the defendant's liabilities and continuing obligations. In determining the amount of income available to meet those costs, the court should additionally consider how long (if at all) the defendant will be working prior to the commencement of trial (if there is to be a trial). See G.L. c. 261, § 27C, which does not attempt to establish standards for determining indigency, but requires that such standards be posted by the court. The court may also utilize G.L. c. 93, § 51 to obtain records from a consumer reporting agency in order to evaluate defendant's affidavit of indigency under G.L. c. 261, § 27B.

Where the court finds that there are assets or income available to be used for the benefit of counsel, the court may then enter an order that the defendant pay a reasonable amount to the court out of his present assets and that he pay a reasonable amount out of future

income on an installment basis for a definite duration. This order, like all subsequent orders regarding the payment of costs, may be modified by the court upon a showing by either the defense or the prosecution of changed circumstances.

A defendant can be ordered to pay in installments to be satisfied out of future income, and to this extent the timing of the burden may be different. However, this can in no way be seen as coercive pressure to find employment, or to maintain present employment or one's present income level, because changed circumstances are grounds for modification of the court order. Thus, the only difference relates to the timing of the burden which does not impede the exercise of one's right to counsel.

The Supreme Court in *Fuller v. Oregon*, 417 U.S. 40 (1974), affirmed the validity of such reasoning:

*The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so....*

*A defendant in a criminal case who is just above the line separating the indigent from the non-indigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.*

Id. at 53-54.

The provisions of subdivision (f)(3) for assignment to defense counsel of any cash bail deposited is new to Massachusetts procedure.

## Rule 34: Report

(Applicable to cases initiated on or after September 7, 2004)

If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

# Rule History

*Amended March 8, 2004, effective September 7, 2004.*

## Reporter's Notes

### *(2004, Revised)*

Under prior practice, the authority of a judge to report a question of law for the decision of the full court was wholly a creature of statute, *Commonwealth v. Cronin*, 245 Mass. 163 (1923), and the procedure was expressly confined to instances where a person had been convicted, G.L. c. 278, § 30 (St. 1830, c. 113, § 4), or before trial had commenced. G.L. c. 278, § 30A (St. 1954, c. 528). The language of this rule is comprised of the statutory provisions of those two sections.

Prior to 1954, a trial judge was authorized to report a question of law only after the conviction of a defendant; no provision granted the court the authority to report an interlocutory question before trial. *Commonwealth v. Baldi*, 250 Mass. 528 (1925). The addition of § 30A by chapter 528 of the Statutes of 1954 gave the court the power to report and have decided a question arising prior to trial, and this procedure has been used increasingly in recent years with the expanded application of fourth, fifth and sixth amendment rights. See, e.g., *Commonwealth v. Baker*, 343 Mass. 162 (1961) (admission to bail); *Commonwealth v. Mekalian*, 346 Mass. 496 (1963) (motion to suppress evidence); *Commonwealth v. O'Leary*, 347 Mass. 387 (1964) (assignment of counsel).

Once trial has commenced, the court may not report a question until after a conviction of the defendant. The definition of "conviction" for purposes of this rule is that provided by the Supreme Judicial Court in *Commonwealth v. Baldi*, 250 Mass. 528 (1925), which may include the judgment of the court following a verdict of guilty or confession of guilt, or may mean a verdict of guilty against the defendant or his confession in open court, without judgment or sentence. *Id.* at 536-37.

Although a report may be made after trial if the defendant consents, it does not preclude the defendant from taking an appeal. See *Commonwealth v. Giles*, 350 Mass. 102 (1966), in which the judge found the defendant guilty and suspended the execution of sentence pending answer to his report from the Supreme Judicial Court. The defendant later appealed the entire case. Conversely, the procedure has also been used to afford a defendant as full a review as he could have obtained had his counsel properly filed an assignment of errors after notice of the completion of the summary of the record. In *Commonwealth v. Pratt*, 360 Mass. 708 (1972), the Supreme Judicial Court treated such a

case as if it had been properly brought on appeal. See *Commonwealth v. Dorius*, 346 Mass. 323, 324 (1963).

The decision to report rests within the discretion of the trial judge. *Commonwealth v. Eagleton*, 402 Mass. 199, 208 (1988). This discretion is to be guided in part by the standard set out by the Supreme Judicial Court in *Commonwealth v. Cavanaugh*, 366 Mass. 277 (1974). This standard, though stated in connection with interlocutory appeals, is, as the court clearly states, applicable to decisions to report:

*“An interlocutory appeal, **like a report**, may be appropriate when the alternatives are a prolonged, expensive, involved or unduly burdensome trial or a dismissal of the indictment.”*

Id. at 279. (Emphasis added). Accord *Commonwealth v. Vaden*, 373 Mass. 397 (1977).

A case may be reported if in the judge’s opinion a question of law is so important or doubtful as to require a determination by a higher court, *Commonwealth v. A Juvenile*, 381 Mass. 727, 728 n.2 (1980). The judge must then refer facts sufficient to make intelligible the question of law reported. *Commonwealth v. Yacobian*, 393 Mass. 1005, 1005-06 (1984); *Commonwealth v. O’Neil*, 233 Mass. 535 (1919). In *Commonwealth v. Ficksman*, 340 Mass. 744 (1960), the Supreme Judicial Court decided that the record before it was insufficient to determine properly the question reported. The court therefore discharged the report and remanded the case to the lower court. The judge should refuse to report a case upon the defendant’s motion if he finds there is no question of law so important as to require higher court resolution, *Commonwealth v. McKnight*, 289 Mass. 530 (1935), or because there is no issue of law. *Commonwealth v. Chase*, 348 Mass. 100 (1964).

The Supreme Judicial Court held in *Commonwealth v. Henry’s Drywall Co., Inc.*, 362 Mass. 552 (1972), that an interlocutory report was not appropriate under the circumstances of the case. Quoting *John Gilbert, Jr. Co. v. C.M. Fauci Co.*, 309 Mass. 271, 273 (1941), Justice Quirico stated that: “Interlocutory matters should be reported only where it appears that they present serious questions likely to be material in the ultimate decision, and that subsequent proceedings in the trial court will be substantially facilitated by so doing.” 362 Mass. at 557. The report was discharged since a decision would have avoided what appeared to the court to be only a short trial which might effectively resolve the issues reported. See *Commonwealth v. Henry’s Drywall Co., Inc.*, 366 Mass. 539 (1974). Interlocutory reports are not to “be permitted to become additional causes of the delays...which are already too prevalent.” *Commonwealth v. Vaden*, 373 Mass. 397 (1977). However, in *Commonwealth v. Shields*, 402 Mass. 162, 163 (1988), the S.J.C. found questions concerning the constitutionality of sobriety roadblocks were appropriately

reported because the answers were likely to be dispositive, the questions were likely to recur, and an improper ruling by the trial court would have resulted in an unnecessary waste of judicial resources at trial.

To help the appellate court decide whether an interlocutory report is appropriate, the reporting court should explain its reasons for declining to wait until after the trial is completed. *Commonwealth v. Wallace*, 431 Mass. 705, 705 n.1 (2000). See also *Commonwealth v. Vaden*, 373 Mass. 397 (1977) (“the report itself, or ... [an] accompanying stipulation or [the] record” should indicate why the issue is appropriate for interlocutory review).

After conviction of the defendant, the trial judge has the authority to make a report whether or not the trial was heard by a jury, so long as it is determined that the defendant is guilty. See *Commonwealth v. Kemp*, 254 Mass. 190 (1926), as to authority to report in a jury-waived trial.

The granting of jurisdiction to the Appeals Court concurrent with the Supreme Judicial Court conforms to existing statutory law. G. L. c. 211A, § 10 established the concurrent jurisdiction:

*Subject to such further appellate review by the supreme judicial court as may be permitted pursuant to section eleven or otherwise, the appeals court shall have concurrent appellate jurisdiction with the supreme judicial court, to the extent review is otherwise allowable, with respect to a determination made in the appellate tax board and in the superior court department, the housing court department, the land court department, the probate and family court department, the Boston municipal court department in criminal session, the Boston municipal court department appellate division, the juvenile court department, the district court department in criminal session, and the district court department appellate divisions, except in review of convictions for first degree murder. A report from any such department of the trial court of any case, in whole or in part, or any question of law arising therein shall be deemed to be within the concurrent appellate jurisdiction of the supreme judicial court and the appeals court.*

A trial judge is to report a case to the Appeals Court. Section 10 states further that appellate review, “if within the jurisdiction of the appeals court, shall be in the first instance by the appeals court....”

Previously a defendant in District Court, except in a jury session trial, was precluded from requesting the judge to report a question. By a 2004 amendment, however, the caption limiting application of this rule was removed. That amendment brings Rule 34 into

conformity with legislation that abolished the de novo district court system and established that “review may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the superior court.” G.L. c. 218, secs. 26A and 27A(g), applicable to judge and jury sessions respectively. Rule 34 now applies to all superior, juvenile, district and municipal courts.

The Supreme Judicial Court is also given general discretionary powers of superintendence under c. 211, §§ 3 and 4A, with which it can review significant interlocutory matters.

*The supreme judicial court may...direct any cause or matter to be transferred from a lower court to it in whole or in part for further action or directions, and in case of partial transfer may issue such orders or direction in regard to the part of such cause or matter not so transferred as justice may require.*

G.L. c. 211, § 4A. Under § 3, it may do so “to correct and prevent errors and abuses...if no other remedy is expressly provided,” and in the interests of “the furtherance of justice and...the regular execution of the laws.”

The broad statutory standard governing matters acceptable for review under §§ 3 and 4A has been narrowly interpreted by the Supreme Judicial Court. The Court has stated that “[o]nly in the most exceptional circumstances will we review interlocutory rulings in criminal cases under our general superintendence powers.” *Gilday v. Commonwealth*, 360 Mass. 170, 171 (1971). To fulfill this requirement there must be a substantial claim of violation of a substantive right and irremediable error, such that the defendant cannot be placed in status quo in the regular course of appeal. *Morrisette v. Commonwealth*, 380 Mass. 197, 198 (1980). See also *Gilday*, supra, at 171; Mass. R. Crim. P. 30, Reporter’s Notes, supra (collecting cases). Moreover, as in the case of a report, the fact that an appeal may be taken from a final judgment after the case has been tried does not prevent the court from acting within its powers of superintendence. *Barber v. Commonwealth*, 353 Mass. 236, 239 (1967).

In *A Juvenile v. Commonwealth*, 370 Mass. 272 (1976), the plaintiff filed a petition for relief in the nature of certiorari with the Supreme Judicial Court under c. 211, § 3. This procedure was sufficient to bring the matter to the court for review.

## **Rule 35: Depositions to Perpetuate Testimony**

(Applicable to District Court and Superior Court)



## (a) General Applicability

Whenever due to exceptional circumstances, and after a showing of materiality and relevance, it is deemed to be in the interest of justice that the testimony of a prospective witness of the defendant or the Commonwealth be taken and preserved, the judge may at any time after the filing of a complaint or return of an indictment, upon his own motion or the motion of either party with notice to all interested persons, order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the judge may direct that his deposition be taken. A copy of a deposition ordered upon the judge's own motion shall be transmitted to the court by the person administering the deposition. In determining a motion filed pursuant to this rule, the judge may order a hearing or may determine whether exceptional circumstances exist and the materiality and relevance of the testimony on the basis of the supporting affidavit.

## (b) Summonses

An order to take a deposition shall authorize the issuance by the clerk of summonses pursuant to rule 17 for the persons and objects named or described in such order. A witness whose deposition is to be taken may be required to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

## (c) Notice of Taking of Deposition

The party on whose motion a deposition is to be taken shall give all interested persons reasonable written notice of the time and place for the taking of the deposition. If a defendant is in custody, the officer having custody of the defendant shall be notified by the court of the time and place set for the taking of the deposition and shall produce the defendant at that time and place and keep him in the presence of the witness during the taking of the deposition. A defendant not in custody shall have the right to be present at the taking of a deposition, but his failure to appear after notice and without cause shall constitute a waiver of the right to be present and of all objections based upon that right.

## (d) Payment of Expenses

Whenever a deposition is taken upon the motion of the Commonwealth, the court shall direct that the reasonable expenses of travel and subsistence of the defendant and his counsel and the witness be paid for by the Commonwealth. Expenses for a deposition

taken upon motion of a defendant may be assessed to the defendant to be paid forthwith or in such other manner as the judge may determine.

## (e) Scope of Examination

Subject to such additional conditions as the judge may specify and except as otherwise provided in these rules, the taking of depositions in criminal cases shall be in the manner provided for in civil actions. The scope and manner of such examination and cross-examination at the taking of the deposition shall be such as would be allowed in the trial itself.

## (f) Objections to Deposition Testimony

Objections to deposition testimony or evidence or parts of thereof and the grounds for the objections shall be stated at the time of the taking of the deposition.

## (g) Admissibility

At a trial or upon any hearing, a part or all of a deposition, so far as it is otherwise admissible under the law of evidence, may be used as substantive evidence if the judge finds that the deponent is unavailable or if the deponent gives testimony at the trial or hearing which is inconsistent with his deposition. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. "Unavailable" as a witness includes situations in which the deponent:

- (1) is exempt by a ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition;
- (2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so;
- (3) lacks memory of the subject matter of his deposition;
- (4) is unable to be present or to testify at the trial or hearing because of death or physical or mental illness or infirmity;
- (5) is absent from the trial or hearing and the proponent of the deposition has been unable to procure the deponent's attendance by process or other reasonable means; or
- (6) is absent from trial or hearing and his testimony was ordered taken and preserved pursuant to rule 6(d)(2).

A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the deponent from attending or testifying.

## (h) Notice

- (1) District Court. All interested parties shall be given reasonable notice by the clerk of the time set for hearing motions filed under this rule.
- (2) Superior Court. The moving party shall notify all interested parties of the time set for hearing motions filed under this rule at least seven days prior to the hearing.

## (i) Deposition by Agreement Not Precluded

Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, by agreement of the parties with the consent of the judge.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

### (1979)

This rule was written in substantial conformity with 18 U.S.C. § 3503 (1970) and is to be governed by the provisions of Mass. R. Crim. P. 13 wherever the two rules are not inconsistent. See Rules of Criminal Procedure (U.L.A.) rules 431-32 (1974), Fed. R. Crim. P. 15.

Previous comparable statutory law in the Commonwealth concerning the taking of depositions in criminal proceedings was General Laws c. 277, § 76 (Rev. St. [1836] 136, § 32) which provided that:

*[Where] an issue of fact is joined upon an indictment, the court may, upon application of the defendant, grant a commission to examine any material witnesses residing out of the commonwealth, in the same manner as in civil causes; and the prosecuting officer may join in such commission and may name any material witnesses to be examined on the part of the commonwealth.*

Section 77 of that same chapter (Rev. St. [1836] c. 136, § 33) provided:

*When such commission is issued . . . and the depositions taken thereon . . . [are] returned, [they] shall be read in the same manner and with the like effect . . . subject to the same exceptions, as in civil cases; but if the defendant on his trial declines to use the deposition so taken, the prosecuting officer shall not, without the defendant's consent, make use of any deposition taken on behalf of the commonwealth.*

Although these statutes provide a basis for this rule, they are superseded by it. The statement that depositions are to be conducted and used “as in civil causes” formerly operated to incorporate by reference G.L. c. 233, §§ 46-63 and Superior Court Rule 37 (1954). This rule is to govern the taking of depositions in criminal cases, but should reference to civil practice be necessary it shall be to Mass. R. Crim. P. 27 and to Superior Court Rules 71-72 (1974), insofar as they are consistent with this rule. See Superior Court Rules, 1974, Annotated 297-309 (Mass. Bar Ed. 1975).

## Subdivision (a)

This rule has adopted the approach set out in the Federal Rules: A request to take a deposition in a criminal case will be granted only in exceptional situations. *United States v. Whiting*, 308 F.2d 537 (2d Cir. 1962). This is because criminal depositions are not for the discovery of information; rather they are intended to preserve evidence. *United States v. Steffes*, 35 F.R.D. 24 (1964).

While it is true that it is far more desirable to secure the actual presence of a potential witness in criminal cases, there are situations in which the use of depositions is required in order to assure that the ends of justice are met, e.g., when a witness' attendance cannot be secured because of sickness or infirmity. (See subdivision [g][4], *infra*). Or, notwithstanding the provisions of G.L. c. 233, § 13A and c. 277, § 66, the right of a defendant to compulsory process for witnesses who are necessary to his defense does not automatically extend beyond the territory of the Commonwealth. *Commonwealth v. Diring*, 354 Mass. 523 (1968). Accord *Commonwealth v. Watkins*, Mass. Adv. Sh. (1978) 1646, 1668-69. See subdivision(g)(5), *infra*.

The Supreme Judicial Court in *Smith v. Commonwealth*, 331 Mass. 585 (1954), specifically mentioned the availability of depositions in criminal cases. In *Smith*, a convicted defendant petitioned for a writ of error alleging that his alibi defense which was supported by affidavits and letters had not received sufficient recognition during the prosecution of his case. The court said that where the defendant's material allegations could have been supported by the testimony of known people residing out of state, the deposition

procedure detailed in G.L. c. 277, §§ 76-77 could have been used advantageously. It is in such a case that the procedures detailed in this rule should be used.

Another set of exceptional circumstances warranting the taking of a deposition was established by statute. Former General Laws c. 276, § 50 (St. 1851, c. 71) provided that the deposition of a witness unable to provide sufficient sureties guaranteeing his appearance in court could be taken upon order of the court with the consent of the defendant. This subdivision does not require the defendant's consent when the court finds that exceptional circumstances justify an order that a witness' deposition be taken.

### Subdivision (b)

This subdivision conforms to Fed. R. Crim. P. 17(f) in explicitly empowering the clerk of the court to issue compulsory process in order to effect the taking of a deposition. It should be noted that it authorizes orders to produce documents, objects, etc., at the taking of the deposition as well. Summonses are treated in full under Mass. R. Crim. P. 17.

### Subdivision (c)

Whenever a defendant is incarcerated, the moving party is responsible for insuring that the defendant has the opportunity to be present while the deponent is being examined. This can be accomplished in either of two ways: by designating the detention facility where the defendant is incarcerated as the place where the deposition is to be taken, or by authorizing the defendant's temporary release for the purpose of attending the examination. The second alternative would require the issuance of a writ of habeas corpus or other similar judicial order.

A defendant not in custody has the responsibility of attending the taking of a deposition unless he has cause for not attending. Insufficient notice and not having been tendered expenses are examples of sufficient cause for non-attendance. By implication, the failure to attend after sufficient notice and tendering of expenses constitutes a waiver of the right to be present unless other cause is shown. Where the defendant has established cause for non-attendance, the deposition should not be used over his objection.

### Subdivision (d)

The provision in this subdivision authorizing payment from public funds is supported by G.L. c. 12, § 24 (as amended, St. 1978, c. 478, § 10), which authorizes district attorneys to expend state monies for the necessary costs of prosecuting a case.

## Subdivision (e)

This subdivision conforms substantially to Fed. R. Crim. P. 15(d), although the Massachusetts rule makes no provision for discovery, a subject which is covered in depth by Mass. R. Crim. P. 14. For deposition practice in civil actions, see Mass. R. Civ. P. 27.

## Subdivision (f)

It is intended that objections to testimony and the grounds therefor are to be stated at the taking of the deposition, consistent with civil practice under Superior Court Rule 71 (1974). See Superior Court Rules, 1974, Annotated 302-03 (Mass. Bar Ed. 1975). The requirement that objections be stated at the taking of a deposition accords with Fed. R. Crim. P. 15(f).

## Subdivision (g)

For all or part of a deposition to be admissible as evidence, the deponent must be unavailable as that term is defined in this subdivision. Prior to the promulgation of this rule, there was no statute or rule which defined “unavailability” in the present context. *Commonwealth v. DiPietro*, Mass. Adv. Sh. (1977) 1971, 1984. Further, the deposition must be otherwise admissible within the law of evidence, i.e., the former testimony exception to the hearsay rule. See Fed.R.Evid. 804(b)(1); *Commonwealth v. McLaughlin*, 364 Mass. 211, 219-23 (1973); *Commonwealth v. DiPietro*, supra, at 1984-92 (collecting cases); *Commonwealth v. Canon*, Mass. Adv. Sh. (1977) 2134, 2141.

As with other manifestations of the sixth amendment right to confrontation, the significant feature is whether the party against whom the deposition is offered had through counsel an adequate opportunity for cross-examination of the deponent. *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965). Accord *Commonwealth v. Canon*, supra; *Commonwealth v. DiPietro*, 4 Mass. App. Ct. \_\_\_\_ (1976), Mass. App. Ct. Adv. Sh. (1976) 1085 (Rescript), aff’d, Mass. Adv. Sh. (1977) 1971; *Commonwealth v. Caine*, 366 Mass. 366, 371-72 (1974); *Commonwealth v. Clark*, 363 Mass. 467 (1973); *Commonwealth v. Mustone*, 353 Mass. 490, 498 (1968). Actual cross-examination is not required, the constitutional requirement is satisfied if the party against whom the deposition is offered was afforded an adequate opportunity to cross-examine. *Pointer v. Texas*, supra; *Commonwealth v. Canon*, supra; *Commonwealth v. DiPietro*, supra; *In re Andrews*, 368 Mass. 468 (1975). That opportunity is to be afforded pursuant to subdivision (e), infra, under which the scope and manner of cross-examination is to be such as allowed in trials.

A deposition otherwise admissible may be introduced as substantive evidence of the matters contained therein if the deponent is unavailable. Any deposition may be used to impeach in accord with established rules of evidence.

Subdivisions (g)(1)-(g)(5) are essentially restatements of Fed.R.Evid. 804(a)(1)-(5). Subdivision (g)(6) is included to make this rule consistent with Mass. R. Crim. P. 6(d)(2).

Subdivision (g)(1) is consistent with *Commonwealth v. Canon*, Mass. Adv. Sh. (1977) 2134 (witness invoked fifth amendment privilege against self-incrimination) and *Commonwealth v. DiPietro*, Mass. Adv. Sh. (1977) 1971 (witness invoked marital privilege). The DiPietro court properly distinguished between the unavailability of a witness and the unavailability of the testimony of that witness:

*“[T]he important element is whether the testimony of the witness is sought and is available and not whether the witness’s body is available.” The physical presence without the testimony contributes nothing to the later trial.*

Mass. Adv. Sh. (1977) at 1987, quoting *Mason v. United States*, 408 F.2d 903, 906 (10th Cir. 1969), cert. denied, 400 U.S. 993 (1971).

Subdivisions (g)(2) and (3) are also concerned with the situation where the witness is present, but unable or unwilling to testify.

As to a deceased or incapacitated witness, subdivision (g)(4), see e.g., *Commonwealth v. Richards*, 35 Mass. (18 Pick.) 434 (1837); *Temple v. Phelps*, 193 Mass. 297 (1906).

For “unavailability” in terms of the witness who cannot be found or is not amenable to process, see e.g., *Commonwealth v. Gallo*, 275 Mass. 320, 324 (1931).

Mass. R. Crim. P. 6(d)(2) authorizes the court to order that the testimony of a witness present in court upon the default of a defendant be taken and preserved, and Mass. R. Crim. P. 10(c) permits the court to condition a continuance upon the taking of and preservation of the testimony of witnesses then present. It is presumed under the former that if a deposition of a witness then present in court is ordered upon the default of a defendant, defendant’s counsel is present in court so as to protect the right of the defendant to confront his accusers under the sixth amendment and *Pointer v. Texas*, supra. The voluntary absence of a defendant from trial operates as a waiver of his sixth amendment right to confrontation. *Taylor v. United States*, 414 U.S. 17 (1973); *Commonwealth v. Flemmi*, 360 Mass. 693 (1971). See also *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970); *Commonwealth v. Snyder*, 282 Mass. 401 (1933), aff’d sub nom., *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934). There is evident a clear analogy between the situation where the defendant voluntarily absents himself from trial and that contemplated by Mass. R. Crim. P. 6(d)(2) where the defendant is found in default.

The summons which is issued pursuant to Mass. R. Crim. P. 6(b)(2) is formulated to give the defendant adequate notice that his willful default may result in the taking of depositions so

as to avoid the sixth amendment confrontation issues raised in *Taylor v. United States*, *supra*.

### Subdivision (h)

This subdivision, generally governing notice, is supplemental to Mass. R. Crim. P. 32.

### Subdivision (i)

Drawn from Fed. R. Crim. P. 15(g), this subdivision recognizes that the parties may find it to their joint advantage to preserve testimony by deposition, or to utilize a deposition at trial, and permits them to do so without having to call upon the court for authorization. If depositions are contemplated, that fact is appropriate for discussion at the pretrial conference. Mass. R. Crim. P. 11(a), (b), Reporter's Notes, *supra*.

## Rule 36: Case Management

(Applicable to District Court and Superior Court)

### (a) General Provisions

#### *(1) Order of Priorities*

The trial of defendants in custody awaiting trial and defendants whose pretrial liberty is reasonably believed to present unusual risks to society shall be given preference over other criminal cases.

#### *(2) Function of the Court*

- (A) District Court. The court shall determine the sequence of the trial calendar.
- (B) Superior Court. The court shall determine the sequence of the trial calendar after cases are selected for prosecution by the district attorney.

### (b) Standards of a Speedy Trial

The time limitations in this subdivision shall apply to all defendants as to whom the return days is on or after the effective date of these rules. Defendants arraigned prior to the effective date of these rules shall be tried within twenty-four months after such effective date.



## *(1) Time Limits*

A defendant, except as provided by subdivision (d)(3) of this rule, shall be brought to trial within the following time periods, as extended by subdivision (b)(2) of this rule:

(A) during the first twelve month period following the effective date of this rule, a defendant shall be tried within twenty-four months after the return day in the court in which the case is awaiting trial.

(B) during the second such twelve-month period, a defendant shall be tried within eighteen months after the return day in the court in which the case is awaiting trial.

(C) during the third and all successive such twelve-month periods, a defendant shall be tried within twelve months after the return day in the court in which the case is awaiting trial.

(D) If a retrial of the defendant is ordered, the trial shall commence within one year after the date the action occasioning the retrial becomes final, as extended by subdivision (b)(2) of this rule. The order of an appellate court requiring a retrial is final upon the issuance by the appellate court of the rescript. In the event that the clerk of the appellate court fails to issue the rescript within the time provided for in Massachusetts Rule of Appellate Procedure 23, retrial shall commence within one year after the date when the rescript should have issued.

If a defendant is not brought to trial within the time limits of this subdivision, as extended by subdivision (b)(2), he shall be entitled upon motion to a dismissal of the charges.

## *(2) Excluded Periods*

The following periods shall be excluded in computing the time within which the trial of any offense must commence:

- (A) Any period of delay resulting from other proceedings concerning the defendant, including, but not limited to:
  - (i) delay resulting from an examination of the defendant and hearing on his mental competency or physical incapacity;
  - (ii) delay resulting from a stay of the proceedings due to an examination or treatment of the defendant pursuant to section 47 of chapter 123 of the General Laws;
  - (iii) delay resulting from a trial with respect to other charges against the defendant, which period shall run from the commencement of such other trial until fourteen days after an acquittal or imposition of sentence;
  - (iv) delay resulting from interlocutory appeals;

- (v) delay resulting from hearings on pretrial motions;
  - (vi) delay resulting from proceedings relating to transfer to or from other divisions or counties pursuant to rule 37;
  - (vii) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.
- (B) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness. A defendant or an essential witness shall be considered absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.
- (C) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.
- (D) If the complaint or indictment is dismissed by the prosecution and thereafter a charge is filed against the defendant for the same or a related offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge.
- (E) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is no cause for granting a severance.
- (F) Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the record of the case, either orally or in writing, his reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.
- (G) Any period of time between the day on which a defendant or his counsel and the prosecuting attorney agree in writing that the defendant will plead guilty or nolo contendere to the charges and such time as the judge accepts or rejects the plea arrangement.
- (H) Any period of time between the day on which the defendant enters a plea of guilty and such time as an order of the judge permitting the withdrawal of the plea becomes final.

### *(3) Computation of Time Limits*

In computing any time limit other than an excluded period, the day of the act or event which causes a designated period of time to begin to run shall not be included.

Computation of an excluded period shall include both the first and the last day of the excludable act or event.

## **(c) Dismissal for Prejudicial Delay**

Notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b) of this rule, a defendant shall upon motion be entitled to a dismissal where the judge after an examination and consideration of all attendant circumstances determines that: (1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant.

## **(d) Special Procedures: Persons Serving Term of Imprisonment**

### *(1) General Provisions*

A person serving a term of imprisonment either within or without the prosecuting jurisdiction is entitled to all safeguards afforded him under subdivisions (a), (b), and (c) of this rule in the conduct of any criminal proceeding, subject to the limitations stated herein.

### *(2) Persons Detained Within the Commonwealth*

Any person who is detained within the Commonwealth upon the unexecuted portion of a sentence imposed pursuant to a criminal proceeding is entitled to be tried upon any untried indictment or complaint pending against him in any court in this Commonwealth within the time prescribed by subdivision (b) of this rule.

### *(3) Persons Detained Outside the Commonwealth*

Any person who is detained outside the Commonwealth upon the unexecuted portion of a sentence imposed pursuant to a criminal proceeding, and against whom an untried indictment or complaint is pending within the Commonwealth shall, subsequent to the filing of a detainer, be notified by the prosecutor by mail of such charges and of his right to demand a speedy trial. If the defendant pursuant to such notification does demand trial, the person having custody shall so certify to the prosecutor, who shall promptly seek to

obtain the presence of the defendant for trial. If the prosecutor has unreasonably delayed (A) in causing a detainer to be filed with the official having custody of the defendant, or (B) in seeking to obtain the defendant's presence for trial, and the defendant has been prejudiced thereby, the pending charges against the defendant shall be dismissed.

## (e) Effect of a Dismissal

A dismissal of any charge ordered pursuant to any provision of this rule shall apply to all related offenses.

## (f) Case Status Reports

### *(1) District Court*

The First Justice of each division of the District Court shall be advised periodically by the clerk of the status of all cases which have been pending in that court for six months or longer. The report shall be transmitted to the Administrative Justice for the District Court Department.

### *(2) Superior Court*

The Administrative Justice for the Superior Court Department shall be notified by the clerk for each county of the status of all cases which have been pending in that court for six months or longer within the following time periods:

- (A) for the first twelve-month period following the effective date of this rule, sixty days after the last day of a sitting;
- (B) for the second such twelve-month period, forty-five days after the last day of a sitting;
- (C) for the third and all successive such twelve-month periods, thirty days after the last day of a sitting.

Such notice shall include the number of the case, the name of the defendant, the offense charged, the name of defense counsel, if any, and the name of the prosecutor.

## Rule History

*Amended effective March 1, 1996.*

# Reporter's Notes

(1996)

This rule is taken in part from the ABA Standards Relating to Speedy Trial (Approved Draft, 1968) and to a lesser extent from the Federal Speedy Trial Act, 18 U.S.C. §§ 3161-74 (Supp. 1, 1975), and former G.L. c. 277, §§ 72 (St.1784, c. 72) and 72A (St.1965, c. 343). See Rules of Criminal Procedure (U.L.A.) rule 722 (1974); ABA Standards Relating to Speedy Trial (2d ed., Approved Draft, 1978).

The Supreme Court held in *Barker v. Wingo*, 407 U.S. 514 (1972), that a defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on an ad hoc balancing basis in which the conduct of the defendant and the prosecution are weighed.

*[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case....*

*Barker v. Wingo*, supra at 522. The Court refused to objectify a "fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial," 407 U.S. at 521, choosing not to engage in legislative or rulemaking activity.

*We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. **The States, of course, are free to prescribe a reasonable period consistent with constitutional standards,** but our approach must be less precise.*

407 U.S. at 523 (Emphasis supplied).

Since the Supreme Court's decision in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), wherein the speedy trial guarantee secured by the sixth amendment was made applicable to and enforceable against the states by virtue of the due process requirements of the fourteenth amendment, three-quarters of the states have enacted, either by court rule or statute, speedy trial provisions. This would seem to indicate that the majority of states have experienced difficulty in affording uniformly fair justice on a case-by-case basis and are seeking to objectify the right so as to ease its application. The Supreme Court in *Barker* does not deny the states this prerogative so long as its exercise is consistent with constitutional standards. 407 U.S. at 530 n. 29.

While Rule 36 does quantify the time limits beyond which a defendant's speedy trial rights shall be deemed to have been denied, it is, as its title makes clear, primarily a management tool, designed to assist the trial courts in administering their dockets.

## Subdivision (a)

Subdivision (a)(1). This subdivision is taken from § 1.1 of the ABA Standards Relating to Speedy Trial (Approved Draft, 1968). See ABA Standards Relating to the Function of the Trial Judge, § 3.8(c) (Approved Draft, 1972); Rules of Criminal Procedure (U.L.A.) rule 721(b) (1974).

Incarcerated defendants under existing Massachusetts law are accorded certain rights. This subdivision is first a general restatement of the principles underlying prior law, rather than a substitute for former statutes, and secondly an aid in the continued implementation of the policy of former G.L. c. 277, § 72, which provided for the release of a defendant from pretrial detention if he had not been tried within the criminal session next following six months of incarceration.

Additionally, the preference given to the trial of criminal defendants held in jail for offenses not punishable by death or life imprisonment over the trial of civil cases by G.L. c. 212, § 29 is to retain its vitality though not expressly adopted by this rule. See G.L. c. 212, § 24. See ABA Standards Relating to Speedy Trial, Standard 12-1.1(a) (2d ed. Approved Draft, 1978), Fed.R.Crim.P. 50(a).

## **Subdivision (a)(2)**

This is modeled after Standard 12-1.2 of the ABA Standards Relating to Speedy Trial, *supra*, and is consonant with the policy of G.L. c. 278, § 1 in that the trial court is given ultimate control over the calendar. See Rules of Criminal Procedure (U.L.A.) rule 721(a) (1974). The guiding principle behind this section was enunciated by the Eighth Circuit:

*The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden of trial promptness is not solely upon the defense.*

Hodges v. United States, 408 F.2d 543, 551 (8th Cir.1969). Accord United States v. Drummond, 511 F.2d 1049, 1053 (2d Cir.1975). See Barker v. Wingo, 407 U.S. 514 (1972).

## **(a)(2)(A)**

In District Court jury-waived sessions, the court is to prepare and control the trial lists consistently with prior practice.

### **(a)(2)(B)**

General Laws c. 278, § 1 requires the district attorney to submit a list to the court of defendants to be tried at each sitting of the Superior Court, and it states that the cases will be tried in the order of the list unless otherwise ordered by the court.

Practice remains unchanged by this rule—the district attorneys are to place cases on the list in the order of priority they believe appropriate; the court may re-order arrangement of the list once it is submitted—but this procedure is extended to District Court jury sessions. General Laws c. 218, § 26A (St.1978, c. 478, § 188) provides for a jury trial in the first instance of all charges over which the District Court has original jurisdiction. If a defendant elects not to waive jury trial, or, having waived that right, claims an appeal to a jury session after conviction, G.L. c. 218, § 27A(g) (St.1978, c. 478, § 189) mandates that a District Attorney shall appear and prosecute the case. Further, G.L. c. 278, § 27A(e) provides that District Court jury sessions shall proceed in accordance with jury trials in the Superior Court. Therefore, subdivision (a)(2)(B) is to be read to empower the District Attorney to select those cases which are to be placed on the District Court jury session trial list. General Laws c. 278, § 1 establishes burdens on the prosecutor who is to keep current the list of cases to be tried and on the court which is to have the ultimate responsibility for the timely trial of those cases. See ABA Standards Relating to the Function of the Trial Judge, § 3.8(a) (Approved Draft, 1972). Practice under this rule will aid in the effective implementation of the speedy trial guarantee for there is a periodic check by the court on the prosecutor. Subdivision (f), *infra*.

### **Subdivision (b)**

General Laws c. 277, § 72 formerly provided for trial within six months after demand by an incarcerated defendant. This subdivision is an expansion of that statutory right, ultimately securing to all defendants the right to trial within twelve months after the filing of charges. Subdivision (b) is intended to insure that a defendant is not denied that right by providing for the dismissal of the charges for undue delay in bringing the defendant to trial.

The effect of this subdivision is not only to establish a specific time limit for commencement of trial, but also to shift the burden of proof concerning a deprivation of the defendant's right to trial within twelve months. The constitutional protection puts the burden on the defendant to show that the delay was undue and to his prejudice, whereas under this rule, once a twelve-month lapse has been shown, the burden shifts to the prosecutor to explain the delay.

General Laws c. 277, § 72 provided that a defendant held in custody upon an indictment had the right to be released on his own recognizance if not brought to trial by the time of the

court's sitting next after six months from his commitment. General Laws c. 277, § 72A gave an incarcerated defendant the right to be tried on pending charges within six months after his application for a speedy trial or the charges would be dismissed. Those statutes were designed to alleviate hardships imposed upon particular defendants by pretrial delay. This subdivision is founded upon the premise that all defendants are liable to suffer from undue delay and that a definite time limit should be made available to them on an equal basis.

### ***Subdivision (b)(1)***

Unlike former G.L. c. 277, § 72A, this subdivision is phrased so that only a trial upon charges against the defendant will satisfy the requirements of this rule. General Laws c. 277, § 72A required either a prompt “trial or ***other disposition*** thereof” (emphasis supplied), thus permitting a defendant's demand to be satisfied by other than a trial upon the charges. *Commonwealth v. Fields*, 371 Mass. 274, 280 (1976); *Commonwealth v. Stewart*, 361 Mass. 857 (1972) (Rescript); *Commonwealth v. Royce*, 358 Mass. 597, 599 (1971); *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647 (1976); *Commonwealth v. Anderson*, 6 Mass. App. Ct. 492 (1978). This change is intended to offer a defendant relief from pending charges and their attendant burdens, thereby giving substance to the speedy trial concept. A dismissal of charges on other grounds, a disposition of the charges by plea, or a filing of the case, of course, vitiates any need for trial, and in such an instance the rule does not apply.

For purposes of this rule, a trial is deemed to have commenced when jeopardy attaches. “In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn.... In a nonjury trial, jeopardy attaches when the court begins to hear evidence.” *Serfass v. United States*, 420 U.S. 377, 388 (1975). Accord *Commonwealth v. Ludwig*, 370 Mass. 31, 33 (1976). See *Commonwealth v. Brandano*, 359 Mass. 332, 334-35, 269 N.E.2d 84 (1971); 30 MASS.PRACTICE SERIES (Smith) § 563 at 290 (1970). If neither of these stages of prosecution has been reached within twelve months after the return day in the court in which the case is pending, the charges must be dismissed upon motion of the defendant. The mandatory sanction for failure to comply with the twelve-month time limit is dismissal of the charges, such dismissal to be a bar to any subsequent prosecution for the same offense or any related offenses, whether by later complaint in the District Court or indictment in the Superior Court. *Commonwealth v. Fields*, 371 Mass. 274 (1976); *Commonwealth v. Ludwig*, *supra*, at 35; subdivision (e), *infra*.

Under this rule, the right to a speedy trial attaches upon “the return day in the court in which the case is awaiting trial,” that is, the date on which “a defendant is ordered by summons to first appear or, if under arrest, does first appear ... to answer to the charges....” Mass.R.Crim.P. 2(b)(15). Therefore, if a defendant is bound over to the Superior Court after



a probable cause hearing (Mass.R.Crim.P. 3[c] ) or the Commonwealth elects to proceed by direct indictment in a case commenced by complaint which is within the District Court's jurisdiction (Mass.R.Crim.P. 3[e]), the time limits of this rule begin anew upon the return day in the Superior Court. See ABA Standards Relating to Speedy Trial, Standard 12-2.2 (2d ed., Approved Draft, 1978); Rules of Criminal Procedure (U.L.A.) Rule 722(d) (1974).

As to re-trials, the right accrues when the certainty of that trial is established, e.g., by a judicial order for a new trial.

#### **Subdivision (b)(1)(D)**

As originally drafted, the Rule left some ambiguity as to when this condition was satisfied in practice. See *Commonwealth v. Levin*, 390 Mass. 857, 860 n. 4 (1984) and *Commonwealth v. Bodden*, 391 Mass. 356, 357-58 (1984). A 1996 amendment settled this issue by declaring that a retrial order is final upon the issuance by the appellate court of the rescript or, if the clerk failed to issue the rescript as required, when it should have issued.

#### **Subdivision (b)(2)**

This is patterned after 18 U.S.C. § 3161(h) (Supp. 1, 1975). See ABA Standards Relating to Speedy Trial §§ 2.1, 2.3 (Approved Draft, 1968); Rules of Criminal Procedure (ULA) Rule 722(f) (1974).

The Supreme Judicial Court has stated that “in addition to periods of time specifically excluded by the rule, periods during which a defendant acquiesced in, is responsible for, or benefitted from a delay are also not counted.” *Commonwealth v. Lauria*, 411 Mass. 63, 68 (1991). See also *Commonwealth v. Conefrey*, 410 Mass. 1, 4-5 (1991); *Commonwealth v. Farris*, 390 Mass. 300 (1983); *Commonwealth v. Look*, 379 Mass. 893 (1980); *Commonwealth v. Alexander*, 371 Mass. 726 (1977); *Commonwealth v. Boyd*, 367 Mass. 169, 178 (1975); *Commonwealth v. Loftis*, 361 Mass. 545, 549-50 (1972); *Commonwealth v. McCants*, 25 Mass.App.Ct. 735 (1988); *Commonwealth v. Jones*, 6 Mass.App.Ct. 750, 752-53 (1978) (interpreting G.L. c. 277, § 72A). But because the Commonwealth has the primary obligation for setting a trial date, a thorough examination of the record is necessary to determine whether failure to object should be counted against the defendant. *Commonwealth v. Spaulding*, 411 Mass. 503, 507 (1992). The specific periods listed in this subdivision are those where the delay is not to be attributed to the prosecution.

Under prior cases in which the *Barker v. Wingo* sixth amendment analysis was applied, absent a showing of culpability on the part of the Commonwealth in delaying trial, the burden was on the defendant to demonstrate that the Commonwealth unreasonably caused prejudicial delay. *Commonwealth v. Gilbert*, 366 Mass. 18, 22 (1974). Accord *Commonwealth v. Campbell*, 5 Mass.App.Ct. 571 (1977); *Commonwealth v. Burhoe*, 3

Mass.App.Ct. 590, 594 (1975); *Commonwealth v. Jackson*, 3 Mass.App.Ct. 511, 517 (1975). Under this rule, however, no demonstration of prejudice is necessary (except under subdivision [c], *infra*); once the defendant has established a *prima facie* case for dismissal—i.e., that twelve months have elapsed since the return day—the burden is on the Commonwealth to establish justification for the delay. The rule requires the court to dismiss the charges (rather than making the decision discretionary and dependent upon a balancing of all relevant considerations) unless an explanation is deemed sufficient to excuse the delay.

Under this subdivision, the court is given the discretion to consider and determine whether a proffered explanation for delay is a valid excluded period. But, once it is determined that a period of delay is within the contemplation of this subdivision, that period shall be excluded from computation of the twelve-month limit. The rationale underlying this subdivision is that the Commonwealth should not be penalized when the defendant elects to avail himself of those procedures which are certain to result in delay, or when the causes for delay are beyond its control.

**(b)(2)(A)(i)**

This subdivision excludes delay due to a mental or physical examination of the defendant to determine his competency or physical capacity to stand trial and the resultant hearing on the matter. This delay is a common occurrence and often essential to a fair trial. See *Commonwealth v. Boyd*, 367 Mass. 169, 178-179 (1975); *Commonwealth v. Rise*, 7 Mass.App.Ct. 106 (1979). It is intended that the excluded period shall begin on the date the order for examination is given and shall extend until such date as the court finds the defendant mentally competent or physically able to stand trial. The court's finding should be made within 30 days after receipt by the court of the examiner's report ( [b][2][A][vii], *infra*) and the excludable period shall continue until such finding is made. It should be noted that the actual time period under (b)(2)(A)(i) may be extended by (b)(2)(C) to exclude any delay resulting from the fact that the defendant is found mentally incompetent or physically unable to stand trial. Fairness requires that a balance be struck between the defendant's right to a speedy trial and those delays which of necessity accompany the examination process and which are beyond the control of the prosecution once the procedure has been ordered.

**(b)(2)(A)(ii)**

It is intended by this subdivision that the excluded period shall begin when the defendant is advised by the court that he may request an examination to determine whether he is a drug dependent person pursuant to G.L. c. 123, § 47. The defendant is then given five days under § 47 in which to exercise his right to an examination. If an examination is not requested

within the provided time limit, the excludable period shall terminate. However, if the defendant elects an examination, the period of time during which he is being examined shall be excluded. Once the defendant has requested examination, the court may, in its discretion, determine without an examination that the defendant would benefit from treatment and shall inform him that he may request treatment in a drug facility. The period of time during which the defendant is undergoing treatment for drug addiction will be excluded under (b)(2)(A)(ii). It is intended that the excluded period shall cover the entire period of delay generated by § 47 examination or treatment.

**(b)(2)(A)(iii)**

This subdivision is intended to be inclusive of trials of the defendant on other charges in any state or federal court including the court where charges are then pending against the defendant. See *Commonwealth v. Anderson*, 6 Mass. App. Ct. 492 (1978); *Commonwealth v. Fasano*, 6 Mass.App.Ct. 325 (1978). The period shall run from the date such other trial begins and it is intended that the period shall conclude 14 days after a verdict of acquittal or imposition of sentence in the case. For the purpose of this subdivision, trial shall include the impanelling of the jury, hearings on motions deferred to the trial date, and any periods during which trial is suspended. The 14-day period following acquittal or sentencing is included in order to provide defense counsel with adequate preparation time for the second trial.

**(b)(2)(A)(iv)**

It is intended that the excluded period under this subdivision run from the date the notice of appeal is filed until the rescript is received by the clerk of the lower court. The period covers any time during which interlocutory appeals are pending. See *Commonwealth v. Underwood*, 3 Mass.App.Ct. 522, 528-29 (1975). Where delay is occasioned by the Commonwealth's successful interlocutory appeal under Mass.R.Crim.P. 15, such delay does not prejudice the defense nor deny the defendant his right to a speedy trial. See *United States v. Rosenbloom*, 511 F.2d 777 (D.C.Cir.1974).

**(b)(2)(A)(v)**

Delay attributable to the securing of a judicial resolution of issues raised by a defendant's pretrial motions are excluded from the running of the time limits. See *Commonwealth v. Morgan*, 6 Mass.App.Ct. 939 (1978) (Rescript); *Commonwealth v. Fasano*, 6 Mass.App.Ct. 325 (1978); *Commonwealth v. Campbell*, 5 Mass.App.Ct. 571 (1977); *Commonwealth v. Burhoe*, 3 Mass.App.Ct. 590, 593 (1975); *Commonwealth v. Underwood*, 3 Mass.App.Ct. 522, 528-29 (1975); *Commonwealth v. Jackson*, 3 Mass.App.Ct. 511, 516-517 (1975).

The excludable period under this subdivision is intended to run from the date on which the request for hearing on the pretrial motion is filed, or, if no such request is filed, from the date the hearing is ordered, until the conclusion of the hearing.

**(b)(2)(A)(vi)**

This subdivision provides that delay due to proceedings related to transfer under Mass.R.Crim.P. 37 shall be an excluded period. In cases transferred pursuant to Rule 37(a)(1) and (2), it is intended that the time limit begin to run on the date the clerk of the court in the transferee district receives the papers from the clerk of the court in the transferor district. In cases where the defendant moves for transfer of the case to another district pursuant to Rule 37(b), an excludable period shall run from the date of the hearing on the motion for transfer. If the motion is denied the period terminates at that time. If the motion is allowed and the case is subsequently transferred, the conclusion of the period will be determined by the court in that district to which the case is transferred. Under this rule, periods that are excluded are not restricted to the proceedings, directly related to transfer pursuant to Rule 37, but are intended to provide as well for delays caused by the transfer of papers from one district to another in transfer proceedings. This is to account for reasonable administrative delays while the court awaits the transfer papers.

**(b)(2)(A)(vii)**

This subdivision provides for those delays which are necessary for the court to pass on proceedings concerning the defendant, exclusive of those periods for consideration of pretrial motions under (2)(A)(v). It is intended by this rule that the excluded period run during the time that the matter is actually under advisement until an order or ruling is entered, but in no event shall the period exceed 30 days. See 18 U.S.C. § 3161(h)(1)(G) . It is not the intent of (2)(A)(vii) to preclude a continuance under Mass.R.Crim.P. 10 after the 30-day time limit is expired, but it is believed that the 30-day limit is reasonable in most cases. Where the matter under advisement is complex, the court may continue the case upon its own motion under (b)(2)(F), *infra*.

**(b)(2)(B)**

If a defendant has made himself unavailable for trial for the purpose of avoiding prosecution, the interests of justice require that he not be allowed to subsequently claim violation of his right to a speedy trial. *Commonwealth v. Underwood*, 3 Mass.App.Ct. 522, 527-28 (1975). Accord *Commonwealth v. Jones*, 6 Mass.App.Ct. 750 (1978). Similarly, delays granted to allow the defendant or the Commonwealth to locate a key witness are justified and not properly chargeable against the Commonwealth. See e.g., *Commonwealth v. Daggett*, 369 Mass. 790, 793-94 (1976); *Commonwealth v. Boyd*, 367 Mass. 169, 178 (1975); *Commonwealth v. Jones*, 6 Mass.App.Ct. 750 (1978);

Commonwealth v. Alves, 6 Mass.App.Ct. 572 (1978); Commonwealth v. Campbell, 5 Mass.App.Ct. 571 (1977); Commonwealth v. Ambers, 4 Mass. App. Ct. 647 (1976). An exclusion under this subdivision will be established by a party on motion for a continuance. It is intended that the excludable period run from the date the motion for a continuance is filed until the date when the defendant or witness is found by the court to have become available for trial. Mass.R.Crim.P. 10 provides that a continuance shall not be granted if a party fails to exercise due diligence to obtain an available witness for trial. Therefore, a party moving for a continuance under this subdivision should set forth with particularity the reasons why a continuance will enable him to obtain the witness and should state those facts as to which the witness is expected to testify. This will enable the court to make the necessary determination, on the facts presented, whether the unavailable witness is so “essential” as to warrant a continuance.

It is intended by this subdivision that a motion for a continuance on the ground of the absence of the defendant explain the facts of the defendant’s absence. Since such absence may occur at any time during the proceedings, it may become necessary for the court to determine how long the defendant has been absent and whether he is attempting to avoid prosecution or whether his whereabouts cannot be determined by due diligence. It is recommended practice under this rule that if a party learns or has reason to believe that a witness will be unavailable, and if the party does not wish to proceed to trial without that witness, that the party move for a continuance as far in advance of trial as is feasible. Counsel should inform the court and the adverse party promptly of the availability of the defendant or witness.

The definition of an absent defendant or witness has been adapted from the ABA Standards Relating to Speedy Trial § 2.3(e) (Approved Draft, 1968); accord Standard 12-2.3(e) (2d ed., Approved Draft, 1978).

**(b)(2)(C)**

Subdivision (b)(2)(A)(i) provides for an excluded period during examination and hearing on the defendant’s competency or ability to stand trial. It is intended that if the court should find the defendant unable to stand trial, a new period will begin under this subdivision, such excluded period to conclude upon a court finding that the defendant is competent and able to stand trial.

**(b)(2)(D)**

This subdivision provides for an excluded period when the prosecution nol prosses the charges pending against the defendant pursuant to Mass.R.Crim.P. 16 and subsequently brings new charges for the same offense. Only the time period during which there are no charges pending against the defendant is to be excluded from the twelve-month limit under

(b)(1). The excluded time period will run only from the time the prosecution dismisses the charges until the return day as to the subsequent charge. For example, if the return day as to certain charges is January 1 and those charges are dismissed by the prosecution six months later, followed by a new complaint or indictment for the same offenses, as to which the return day is August 1, the prosecution has until February 1 to bring the defendant to trial. The one-month period during which no charges were pending is excluded, but the previous six months during which charges were outstanding is counted against the Commonwealth. See *Commonwealth v. Gove*, 366 Mass. 351, 359 (1974).

**(b)(2)(E)**

Under this subdivision, reasonable delay where no motion for severance has been granted and the time for trial has not run as to the joined defendant shall be an excluded period. See *Commonwealth v. Beckett*, 373 Mass. 329 (1977); *Commonwealth v. Carr*, 3 Mass.App. 654, 656-57 (1975). Situations may arise where the period of delay could prove unreasonable; for example, where the joined defendant is indefinitely unavailable for trial or cannot be brought into custody. In such a situation it is not intended that the trial of the defendant presently in custody pending trial be deferred.

**(b)(2)(F)**

This subdivision excludes delay resulting from a continuance granted upon a finding that “the ends of justice ... outweigh the best interests of the public and the defendant in a speedy trial.” It is implicit that (b)(2)(F) does not countenance an after-the-fact appraisal of the causes of delay by a reviewing court; in order to be excluded, the delay must have been the subject of a formal continuance. This does not, of course, preclude the appellate court from considering whether the grant or denial of a continuance constituted an abuse of discretion. See Mass.R.Crim.P. 10. Since only a judge may grant a continuance under Rule 10, the Commonwealth’s failure to bring a case to trial without such a continuance, or its unilateral rescheduling a case to a later trial list, see G.L. c. 278, § 1, will not toll the speedy trial clock under this subsection. *Commonwealth v. Spaulding*, 411 Mass. 503, 508-10 (1992). (failure of defendant to object to delay in scheduling did not toll period); *Barry v. Commonwealth*, 390 Mass. 285, 296 n. 13 (1983) (Commonwealth’s setting of trial date does not toll period).

When a formal continuance is granted, this subdivision incorporates the procedure stated to be “advisable” under former G.L. c. 277, § 72A which requires the trial judge to state the reasons for any extension of time hereunder. *Commonwealth v. Fields*, 371 Mass. 274, 280 n.8 (1976); *Commonwealth v. Boyd*, 367 Mass. 169, 178 (1975); *Commonwealth v. Loftis*, 361 Mass. 545, 549 (1972); *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647 (1976).

Delay which is justified under this subdivision may include that required for the Commonwealth to comply with a discovery order, *Commonwealth v. Anderson*, 6 Mass. App. Ct. 492 (1978); that required by newly-appointed counsel to prepare the case, e.g., *Commonwealth v. Campbell*, 5 Mass.App.Ct. 571 (1977); or that occasioned by the illness of the defendant, a co-defendant, counsel for the defendant or the Commonwealth, or the judge. *Commonwealth v. Campbell*, *supra*.

On the other hand, undue delay attributable to a defendant's desire to be represented by particular counsel is not justified. E.g., *Commonwealth v. Dabrieo*, 370 Mass. 728, 739 (1976). See Mass.R.Crim.P. 10(a)(2)(c) and Reporter's Notes, *supra*.

While the Supreme Judicial Court has indicated that court congestion will not be tolerated as an adequate ground for denying a "reasonably prompt trial," *Commonwealth v. Beckett*, 373 Mass. 329, 332, 335 (1977), delay "inherent in the general problems of the administration of justice in a congested county," *Commonwealth v. Rego*, 360 Mass. 385, 392 (1971), is an often-cited excuse for an extension of time limits. *Commonwealth v. Gove*, 366 Mass. 351, 362-63 (1974); *Commonwealth v. Fontaine*, 8 Mass.App.Ct. 51 (1979); *Commonwealth v. Jones*, 6 Mass.App.Ct. 750, 755-56 (1978) (interpreting G.L. c. 277, § 72A); *Commonwealth v. Campbell*, 5 Mass.App.Ct. 571 (1977); *Commonwealth v. Ambers*, 4 Mass. App. Ct. 647 (1976); *Commonwealth v. Burhoe*, 3 Mass.App.Ct. 590, 593 (1975). Although crowded dockets, lack of counsel, and other factors make some delays inevitable, *Commonwealth v. Beckett*, *supra*, a judge presented with a motion for a continuance on this ground is to carefully weigh the interests of the defendant and the public. See also *Commonwealth v. Plantier*, 22 Mass.App.Ct. 314 (1986) (dismissal within court's discretion where defendant prepared but case continued due to prosecutor's request or court congestion).

Although the Rule does not say so, caselaw since its promulgation has held that the defendant's failure to object to a continuance may render the continuance period excludable. *Commonwealth v. Dias*, 405 Mass. 131, 139 (1989); *Commonwealth v. Farris*, 390 Mass. 300 (1983); *Commonwealth v. Fleenor*, 39 Mass.App.Ct. 25, 27 (1995); *Commonwealth v. Domingue*, 18 Mass.App.Ct. 987 (1984), review denied 393 Mass. 1105 (1985). Moreover, as indicated in the Reporter's Notes, *supra* at (b)(2), caselaw has enunciated a broader rule which may exclude some delays which the defense acquiesced in, is responsible for, or benefitted from.

#### **(b)(2)(G)**

This subdivision extends the rule that a valid plea of guilty constitutes a waiver of any claim to a denial of a speedy trial to the situation where, pursuant to Mass.R.Crim.P. 12(b), the defendant and the Commonwealth have concluded a plea arrangement. *Becker v.*

Nebraska, 435 F.2d 157 (8th Cir.1970), cert. denied 402 U.S. 981 (1971); *Fowler v. United States*, 391 F.2d 276, 277 (5th Cir.1968); *United States v. Doyle*, 348 F.2d 715, 718-19 (2d Cir.), cert. denied sub nom. *Doyle v. United States*, 382 U.S. 843 (1965). See *Commonwealth v. L'Italien*, 3 Mass.App. 763 (1975).

#### **(b)(2)(H)**

The same principle which governs in subdivision (b)(2)(G) operates to exclude the time between which a plea is tendered and accepted by the court under Mass.R.Crim.P. 12(c)(5) and the time at which it is withdrawn by the defendant pursuant to Mass.R.Crim.P. 12(d). It is intended that the excluded period run from the date the plea of guilty is first offered and accepted until the date the court permits withdrawal of the plea.

#### ***Subdivision (b)(3)***

The provision as to excluded periods is contrary to G.L. c. 4, § 7 and Mass.R.Crim.P. 46(a), which state that the day on which a limited period commences shall be excluded from the computation. This subdivision is in other respects consistent with prior law. See *Commonwealth v. Daggett*, 369 Mass. 790, 792 n.1 (1976). See ABA Standards Relating to Speedy Trial § 3.2 (Approved Draft, 1968), Standard 12-3.2 (2d ed., Approved Draft, 1978).

#### **Subdivision (c)**

It is possible, although unusual, that a delay of less than twelve months could be deemed prejudicial and therefore violative of a defendant's right to be tried with reasonable dispatch. Under this subdivision a dismissal of charges would be warranted in such a situation.

For those defendants who are not yet entitled to the mandatory dismissal upon motion under subdivision (b)(1), this subdivision states the standard by which an allegation of a denial of a speedy trial may nonetheless be judged: it is a statement of the fundamental constitutional guarantee. The twelve-month rule sets a standard which is quantitative and whose limits are easily determined, whereas the constitutional standard is a relative qualitative concept demanding that the severity of the denial of its protection to a defendant be dependent upon the facts of his case.

*Barker v. Wingo*, 407 U.S. 514 (1972), and *Commonwealth v. Horne*, 362 Mass. 738 (1973), make it clear that a balancing approach must be used to determine whether a defendant's constitutional right to a speedy trial has been violated. E.g., *Commonwealth v. Beckett*, 373 Mass. 329 (1977); *Commonwealth v. Dabrieo*, 370 Mass. 728 (1976); *Commonwealth v. Daggett*, 369 Mass. 790 (1976); *Commonwealth v. Gove*, 366 Mass. 351, 361-65 (1974). For purposes of this analysis, the right to a speedy trial under art. II of the Massachusetts Declaration of Rights and under the sixth amendment to the United States Constitution are



considered to be coextensive. *Commonwealth v. Gove*, supra at 356 n. 6; *Commonwealth v. Underwood*, 3 Mass.App.Ct. 522, 526 (1975).

This subdivision puts the constitutional standard into manageable operational terms. Four factors were mentioned by the United States Supreme Court in *Barker* as among those to be considered: the length of delay, the reason for delay, the resulting prejudice to the defendant, and the assertion of the right by the defendant. This subdivision isolates two essential factors which are the substance of the constitutional protection. These are unreasonable prosecutorial delay and resulting prejudice to the defendant.

Subdivision (c)(1) states that only prosecutorial delay is within the scope of the relief afforded by this subdivision. This protection is compatible with the constitutional protection. *Commonwealth v. Lauria*, 359 Mass. 168 (1971); *Commonwealth v. Thomas*, 353 Mass. 429 (1967). This subdivision requires the defendant to establish first that the delay he has endured is unreasonable and secondly that it was caused by the prosecutor. If the delay is of that nature, the defendant has conclusively established one of the two requisites to a finding that his motion to dismiss the charges is to be granted.

There is no disagreement with the proposition that only an unreasonable delay is prohibited by the Constitution and that what is unreasonable depends upon the peculiar facts of each case. For example, the amount of time that a prosecutor needs to prepare a case in which several defendants have been joined for trial is normally greater than the time needed to prepare for the trial of a single defendant. See *Commonwealth v. Dominico*, 1 Mass.App.Ct. 693 (1974).

Subdivision (c)(2) establishes the second element which the defendant must show to support his motion: that he has been prejudiced by the delay. Prejudice in the context of this subdivision is not restricted to prejudice to the preparation or presentation of the defense. The Supreme Court in *Barker v. Wingo*, supra, listed three distinct functions served by the prohibition against unreasonable delay: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Id.* at 532.

If the defendant is able to show that deliberate, unreasonable prosecutorial delay has operated to his prejudice, the appropriate sanction is dismissal of the charges with prejudice to the Commonwealth. Support for such a sanction is even stronger when imposed for constitutional reasons. The Supreme Court in *Strunk v. United States*, 412 U.S. 434 (1973), declared that dismissal with prejudice was the only permissible remedy for violation of the constitutional speedy trial protection.

The judge is always given discretion in his determination of whether the defendant has been prejudiced to an extent that will require dismissal of the indictment due to prosecutorial delay.

## Subdivision (d)

This subdivision is based upon G.L. c. 277, §§ 72-72A. See ABA Standards Relating to Speedy Trial, § 3.1 (Approved Draft, 1968), Standard 12-3.1 (2d ed., Approved Draft, 1978).

The statement in subdivision (d)(1) that prisoners are entitled to all the safeguards of a defendant whose liberty is not similarly impaired recognizes that a prisoner does not by reason of his status alone lose the protection of the Constitution or of this rule. It is not intended to declare, however, that all substantive rights of an unimprisoned defendant are to be accorded a prisoner. The same rights can apply with equal force in different circumstances and impose differing duties on the Commonwealth. A separate subdivision is devoted to prisoners' speedy trial rights because the substance of those rights is different from that of other accused persons. Imprisonment necessarily affects both the duty which the Commonwealth has to deliver a defendant to trial and the nature of the prejudice that might result from a delayed trial.

Subdivision (d)(2) extends to defendants incarcerated within the Commonwealth for other crimes the same speedy trial rights guaranteed to other defendants by subdivisions (b)(1) and (c).

Subdivision (d)(3) is largely a restatement of G.L. c. 277, § 72A, which is applied to prisoners incarcerated "outside" the Commonwealth. This is to be read to include prisoners within federal custody, although physically present within Massachusetts.

The Constitution has been interpreted to require of the prosecutor only that which he is reasonably able to accomplish. *Commonwealth v. McGrath*, 348 Mass. 748 (1965). Where a defendant is imprisoned in a foreign jurisdiction and his extradition is impeded—whether by his own opposition or by that of the executive of the incarcerating jurisdiction—it would be unfair to attribute the delay in bringing the defendant to trial to the Commonwealth if it had made all reasonable efforts to secure the defendant's presence. It would be equally unfair to require the Commonwealth to guarantee trial within a specified time limit.

There is disagreement among jurisdictions as to what the speedy trial provision of the Constitution requires of a state seeking to obtain the presence of a prisoner incarcerated in another jurisdiction, although it is clear that where a defendant's presence cannot be obtained because the incarcerating state refuses to deliver him, there is no denial of the defendant's constitutional right to a speedy trial. See ABA Standards Relating to Speedy Trial, § 3.1, comment at 31 (Approved Draft, 1968). It is also clear that Massachusetts is

one of the many states to require the prosecution to use all reasonable efforts to obtain the presence of a foreign prisoner for trial upon pending charges, although this position is not universally accepted. *Commonwealth v. Green*, 353 Mass. 687, 690 (1968).

Uniform acts dealing with extradition have been adopted by many states. The Agreement On Detainers, G.L. c. 276, App. §§ 1-1 et seq., gives prisoners the right to have a trial within one hundred eighty days of their delivery to the jurisdiction where charges are pending. This statute, which has been adopted by thirty-two jurisdictions, gives substance to the rights of prisoners and is to be read as a complement to this rule. The Uniform Criminal Extradition Act, G.L. c. 276, §§ 11-20R, which has been adopted by forty-seven jurisdictions, establishes procedures for orderly extradition; it sets out proper procedures for a request for delivery, the arrest of the alleged criminal, and his delivery to the requesting state. Section 20G of this statute, however, still affords governors the discretion to refuse delivery of prisoners.

Massachusetts courts have required the Commonwealth to use due diligence in seeking to bring a foreign prisoner to trial. In light of the legal limitations of rendition this is a fair standard. This rule attempts to put the diligence standard in operational terms. The speedy trial rights of a foreign prisoner are defined under this rule as follows: the Commonwealth must diligently notify a foreign prisoner of pending charges and must promptly seek to obtain his presence for trial; if the Commonwealth is dilatory in either filing a detainer or seeking to obtain the defendant's presence and the prisoner is prejudiced by the delay, the charges must be dismissed. The defendant is given the right to make a demand, although the demand under this rule does not affect the Commonwealth's duty to obtain the defendant's presence. The Commonwealth must use due diligence whether or not a demand has been made. However, the demand is relevant to a determination of the prejudice incurred by the defendant, and under the Agreement on Detainers, a demand entitles a defendant to a trial within one hundred eighty days of his delivery.

### Subdivision (e)

In *Commonwealth v. Gove*, 1 Mass.App. 614 (1973), aff'd, 366 Mass. 351 (1974), it was held that a defendant did not have the right to be simultaneously charged with all the offenses which might have been committed in the course of a single act or a closely related series of acts. One result is that a dismissal of the charge of one of a number of related offenses on denial of speedy trial grounds would not bar the Commonwealth from charging the defendant with another of the related offenses. A second result is that if a significant amount of time had elapsed between the filing of charges of two related offenses, and the earlier charge was dismissed because the twelve-month limit of this rule had passed, the

Commonwealth could proceed to trial on the later charge. Subdivision (e) effectively vitiates the Gove decision.

Standard 12-4.1 of the ABA Standards Relating to Speedy Trial (2d ed., Approved Draft, 1978), states that if a charge is dismissed on speedy trial grounds “[s]uch discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense.”

The Supreme Judicial Court, citing with approval ABA Standards § 4.1, (Approved Draft, 1968), has held that

*the dismissal of a complaint in the District Court on the ground that the defendant has been denied his right to a speedy trial is a bar to any subsequent prosecution for the **same offense** whether by later complaint ... or by an indictment....*

Commonwealth v. Ludwig, 370 Mass. 31, 35 (1976) (emphasis supplied). Accord Commonwealth v. Fields, 371 Mass. 274, 275 (1976) (dismissal of complaint in District Court on speedy trial grounds bar to subsequent prosecution of same offense by indictment in Superior Court). While agreeing with the ABA Standards insofar as holding dismissal to constitute an absolute discharge of the prosecution of the offense charged, the Ludwig court did not reach the issue of whether such a discharge was to encompass other offenses.

Subdivision (e) states that a dismissal of any charge ordered pursuant to Rule 36 “shall apply to all related offenses.” Offenses are related when they

*are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.*

Mass.R.Crim.P. 2(b)(14); 9(a)(1). This subdivision expands the principle of ABA Standard 12-4.1 further, mandating that the dismissal shall be not only as to charges required to be joined with that dismissed, but also as to any charges which could have been joined under Mass.R.Crim.P. 9(a)(2).

This position is advanced in the interests of fairness to a defendant. Without such a provision, a defendant could be subjected to harassment by a prosecutor who might essentially relitigate the same issues he was barred from litigating for failure to accord the defendant his rights under this rule.

## Subdivision (f)

Under this rule, the respective clerks are to have the burden of periodically informing the first justice of each District Court division and the Administrative Justice of the Superior Court Department of cases which have been pending longer than six months.

# Rule 37: Transfer of Cases

(Applicable to District Court and Superior Court)

## (a) Transfer for Plea and Disposition

### *(1) District Court*

A defendant against whom a complaint is pending and who appears in District Court, whether under arrest or pursuant to a summons, and against whom a complaint is pending in a division other than that in which he appears, may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the division in which the other complaint is pending, and to consent to disposition of the case in the division in which he appears. The District Court in which the defendant appears may order that the other complaint be transferred for disposition, subject to the written approval of the prosecutor in each division.

### *(2) Superior Court*

A defendant against whom a complaint or indictment is pending and who appears in Superior Court, whether under arrest or pursuant to a summons, and against whom a complaint or indictment is pending in a county other than that in which he appears, may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the county in which the other complaint or indictment is pending, and to consent to disposition of the case in the county in which he appears. The Superior Court in which the defendant appears may order that the other complaint or indictment be transferred for disposition, subject to the written approval of the prosecuting attorney in each county.

### *(3) Effect of Not Guilty Plea*

If after a proceeding has been transferred pursuant to subdivision (a) of this rule the defendant pleads not guilty, the clerk shall return the papers transmitted pursuant to subdivision (c) of this rule to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court.

## (b) Transfer for Trial

### *(1) Transfer for Prejudice*

A judge upon his own motion or the motion of a defendant or the Commonwealth made prior to trial may order the transfer of a case to another division or county for trial if the court is satisfied that there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial.

### *(2) Transfer of Other Cases*

A judge, upon motion of a defendant made pursuant to subdivision (3) or (4) of rule 9(a), and after taking into account the convenience of the court, the parties, and their witnesses, may with the written approval of the prosecuting attorney in each division or county order the transfer and consolidation for trial of any or all charges pending against the defendant in the several divisions or counties of the Commonwealth.

## (c) Proceedings on Transfer

Upon receipt of the defendant's statement and the written approval of the prosecutor required by this rule, the clerk of the court in which a complaint or indictment is pending shall transfer the papers in the case and any bail taken to the clerk of the court to which the case is transferred. The clerk of the transferee court shall make immediate entry of the case upon the docket of that court and shall so notify the clerk of the transferor court so that the case may be closed on the docket of that court. The prosecution shall continue in the transferee court.

## Rule History

*Amended February 22, 2022, effective April 1, 2022.*

## Reporter's Notes

### *(2022)*

The amendment to the heading of Rule 37(a) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020).

(1979)

This rule is drawn from Fed. R. Crim. P. 20, 21 and 22 and substantially expands Massachusetts practice relative to the transfer of pending criminal proceedings.

### Subdivision (a)

Subdivisions (a)(1) and (2), applicable respectively to the District and Superior Court Departments, are modeled after Fed. R. Crim. P. 20(a) and 22. It is intended that the request to consolidate complaints or indictments for plea and sentence is to be made at the initial appearance. The arraignment date is to be set at a time sufficiently after the initial appearance to allow the transmittal of the necessary papers (See subdivision [c], *infra*). The rule is not to be read to permit the consolidation of an indictment with a complaint for trial or plea in the District Court. Nor may complaints pending in District Court be consolidated with Superior Court proceedings (except where the defendant waives indictment and is bound over so that the case is properly in Superior Court. Mass. R. Crim. P. 3). Where the defendant appears in Superior Court upon a complaint or indictment and there are complaints outstanding in divisions of the District Court within that same county, the District Attorney may proceed by direct indictment (Mass. R. Crim. P. 3[e]), may make an appropriate disposition of the lower court charges pursuant to a plea arrangement (Mass. R. Crim. P. 12[b]), or may not prosecute the charges (Mass. R. Crim. P. 16) if the interests of the parties and the court so dictate.

Subdivision (a)(3) is substantially identical to Fed. R. Crim. P. 20(c).

### Subdivision (b)

Subdivision (b)(1) parallels Fed. R. Crim. P. 21(a) and has a statutory precedent in G.L. c. 277, § 51.

Under most circumstances a trial is held where the indictment or complaint is pending. This in fact is a constitutional right of the defendant. Article 13 of the Massachusetts Declaration of Rights provides:

*In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.*

However, the common law recognized the right of a defendant to have the case removed to another community for the purpose of achieving an impartial trial. *Commonwealth v. Handren*, 261 Mass. 294, 296-97 (1927); *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 174-75 (1911). And the right to a fair and impartial trial is guaranteed by the fourteenth amendment to the United States Constitution, which right includes the right “to

show that a change of venue is required” in a particular case. *Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971).

A defendant in a capital case has a statutory right to seek a transfer of the trial to any adjoining county. G.L. c. 277, § 51. This statutory right is, in many cases, too limited to permit removal to a venue uninfected by the prejudice and the statute is not to maintain its vitality except as precedent for the broader rule. See generally *Commonwealth v. Turner*, 371 Mass. 803, 807 (1977). In some cases, the transfer need not be to another county if an impartial jury panel can be found in another court within the same county.

The motion must be made prior to trial. See *Commonwealth v. Noxon*, 319 Mass. 495, 550 (1946). If the jury has been impanelled, and the court is satisfied that the jurors are impartial, the defendant cannot later claim that the situs of trial was improper.

The trial court has discretion as to whether pretrial publicity has so infected the community where proper venue lies as to require a transfer to another community. E.g., *Commonwealth v. Turner*, 371 Mass. 803, 806-07 (1977). The transfer, however, should not be ordered without a substantial showing of prejudice. As the Supreme Judicial Court said in *Crocker v. Justices of the Superior Court*, 208 Mass. 162 (1911):

*Such a motion ought not to be granted upon mere suggestion, nor unless the reason for it is fully established. It is a jurisdiction which should be exercised with great caution and only after a solid foundation of fact has been first established. Manifestly, it should be resorted to only in aid of justice, and it should not be permitted to be employed as an instrument of obstruction or as a means of delay.*

*Id.* at 180.

The mere fact that a juror has been exposed to pretrial publicity concerning the case does not mean that his impartiality has been affected. This normally can be adequately tested during the voir dire. *Commonwealth v. Smith*, 357 Mass. 168 (1970). In addition to questioning prospective jurors as to their bias, the court should consider the extent of the publicity concerning the case and the nature of the charges. Some crimes give rise to heightened community response more readily than others. See *Commonwealth v. Blackburn*, 354 Mass. 200, 203-04 (1968); *Commonwealth v. Smith*, 353 Mass. 487, 489-90 (1968). In some cases the extent of the publicity will be so great as to mandate a transfer of the trial. It is presumed in these cases that an impartial jury cannot be obtained from the mere fact of the exposure of the crime to the public. *Rideau v. Louisiana*, 373 U.S. 723 (1963).

Subdivision (b)(2), drawn from Fed. R. Crim. P. 21(b), provides for the inter-division or inter-county transfer of charges of related offenses for trial. Such transfer is contingent upon the



approval of the court and of the prosecutors involved. The rule is intended to conserve judicial resources by obviating the need for separate trials of related offenses which were committed in different divisions or counties.

### Subdivision (c)

This subdivision is in conformity with both Fed. R. Crim. P. 20(a) and 21(c) and with G.L. c. 277, § 52. The language was taken in part from each source.

Other statutes in Massachusetts are applicable to the transfer of cases in specific factual situations, and these are to maintain their vitality. General Laws c. 277, § 53 is applicable when the transfer is to a different county and the defendant is in custody. It should be noted that while this rule is concerned with the transfer of cases which are to be tried in Superior Court upon indictment, it is intended to be equally applicable to cases to be tried in District or Superior Court upon complaint. In this respect, the rule goes beyond the provisions of G.L. c. 277, §§ 51-54 which are, technically speaking, applicable only to trial upon indictment.

## Rule 38: Disability of Judge

(Applicable to Superior Court and jury sessions in District Court)

### (a) During Trial

If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge of that court or properly assigned to that court, upon certifying in writing that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

### (b) Receipt of Verdict

Any judge of a court or any judge properly assigned to that court may receive a verdict of the jury.

### (c) After Verdict or Finding of Guilt

If by reason of absence, unavailability, death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the judge after a verdict or finding of guilt, any other judge of that court or properly assigned to that court may perform those duties; but if the other judge is satisfied that he cannot

perform those duties because he did not preside at the trial or for any other reason, he may, in his discretion or upon motion of the defendant, order a new trial.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

### (1979)

Rule 38 has no counterpart in the statutory or case law of the Commonwealth. The rule closely parallels Fed. R. Crim. P. 25, although there is some deviation. See Rules of Criminal Procedure (U.L.A.) rule 741 (1974); ABA Standards Relating to Trial by Jury (2d ed., Approved Draft, 1978).

### Subdivision (a)

This subdivision is drawn nearly verbatim from ABA Standards Relating to Trial by Jury § 4.3 (Approved Draft, 1968), differing in that under the rule the substituted judge must be of the same court in which the proceeding is held, or properly assigned to that court. It has been intimated that the federal analogue to this subdivision, Fed. R. Crim. P. 25(a), is open to constitutional inquiry. 2 C. Wright, Federal Practice and Procedure: Criminal § 392 (1969, Supp. 1978). It is suggested further, however, that no substantial constitutional infirmity exists if a defendant consents to the substitution of judges during the trial. *Id.* See Rules of Criminal Procedure (U.L.A.) rule 741(e) (1974), which would require the parties' consent to the substitution of a specified judge. Whether or not constitutionally mandated, it would be the better practice to obtain the defendant's consent to substitution in writing to be made a part of the record.

### Subdivision (b)

This subdivision constitutes the most significant departure from Federal Rule 25. It is felt that the receipt of a verdict is a court function ministerial in nature and need not be performed by the judge who presided at trial. Subdivision (b) is intended to implement the efficient use of judicial manpower by permitting a single judge to take verdicts in more than one trial and to circumvent the need for a judge to interrupt other business to receive a verdict.

## Subdivision (c)

The constitutionality of the federal equivalent of this subdivision, Fed. R. Crim. P. 25(b), was questioned as to the power of a substitute judge to act in the case. Its validity was sustained in *Connelly v. United States*, 249 F.2d 576 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958). See Rules of Criminal Procedure (U.L.A.) rule 741(f) (1974).

The power granted to the succeeding judge to “perform the duties to be performed by the court after a verdict or finding of guilt” is intended to encompass the authority and duty to hear post-conviction proceedings under Mass. R. Crim. P. 30. See former G.L. c. 278, § 31A, which permitted a substitute justice to examine and allow or disallow a bill of exceptions.

The final clause of subdivision (c) gives rise to potential problems of constitutional dimension regarding the ordering of a new trial by a successor judge. Under this rule, the successor judge may order such a trial “in his discretion, or upon motion of the defendant . . .” A new trial in the latter situation raises no issue and is supported by precedent. See *United States v. Tateo*, 377 U.S. 463 (1964).

Regarding the former situation, however, for a trial judge to grant a new trial sua sponte, and presumably, over defendant’s objection, may raise fifth amendment problems of double jeopardy. 2 C. Wright, *Federal Practice and Procedure: Criminal* § 551 at 483 (1969, Supp. 1978). See *United States v. Smith*, 331 U.S. 469, 474-75 (1947).

The current law with respect to the double jeopardy implications of a declaration of a mistrial over a defendant’s objections involves a balancing of competing interests:

*A defendant has a ‘valued right to have his trial completed by a particular tribunal.’ [citations omitted]. Because of this right, a court may not declare a mistrial without consent of the defendant unless there is a ‘manifest necessity for the act, or the ends of public justice would otherwise be defeated.’[citations omitted].*

*United States v. Lansdown*, 460 F.2d 164, 168 (4th Cir. 1972). See *Wade v. Hunter*, 336 U.S. 684, 689 (1949). This doctrine of “manifest necessity,” enunciated in the early case of *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), remains consistently adhered to and approved by the Supreme Court. *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971). See also *United States v. Wilson*, 420 U.S. 332, 344 (1975).

At the same time, the *Perez* formulation, the Supreme Court has emphasized, is not so rigid as to be mechanically applied:

*This formulation . . . abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial **in the varying and often unique situations arising during the course of a criminal trial**. The broad discretion*

*reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this court.*

Illinois v. Somerville, supra at 462 (Emphasis added).

The relatively rare, if not unique, issue posed by subdivision (c) presents several new considerations. The “broad discretion reserved,” Illinois v. Somerville, supra, will be wielded in this context by a successor to the disabled trial judge. Furthermore, the Court’s admonition that trial judges must not “foreclose the defendant’s option” to proceed to the first jury until they have completed a “scrupulous exercise” of their discretion, United States v. Jorn, supra at 485, takes on heightened significance where, as here, the defendant has already gone to the first jury.

Nevertheless, it is submitted that the Perez doctrine as refined by the Court today applies to the post-verdict situation in this subdivision. See Illinois v. Somerville, supra at 467, where the Court intimates a distinction between mistrials declared prior to and those declared after verdict. Thus, in the careful exercise of his discretion, a trial judge, or successor judge, must weigh the defendant’s “valued right to have his trial completed by a particular tribunal” against “the public’s interest in fair trials designed to end in just judgments.” Wade v. Hunter, supra at 689. If the judge, then, “is satisfied that he cannot perform . . . [the post-verdict duties of the court], he may . . . order a new trial” without unconstitutionally subjecting a defendant to double jeopardy.

## **Rule 39: Records of Foreign Proceedings and Notice of Foreign Law**

(Applicable to District Court and Superior Court)

### **(a) Records of Courts of Other States or of the United States**

The records and judicial proceedings of a court of another state or of the United States shall be competent evidence in this Commonwealth if authenticated by the attestation of the clerk or other officer who has charge of the records of such court under its seal.

## (b) Notice of Foreign Law

The court shall upon request take judicial notice of the law of the United States or of any state, territory, or dependency thereof or of a foreign country whenever it shall be material.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

(1979)

Rule 39 substantially conforms to G.L. c. 233, §§ 69-70. See Fed. R. Crim. P. 26.1.

### Subdivision (a)

General Laws c. 233, § 69, from which this sub-division is taken, does not require “that a record be fully extended in order to afford proof of judgment if the facts essential there to are set forth.” *Commonwealth v. Rondoni*, 333 Mass. 384, 386(1955). *Rondoni* should be examined as illustrative of what serves as sufficient attestation by the officer in charge of judicial records. *Id.* at 385-86.

### Subdivision (b)

This is taken with little change from G.L. c.233, § 70. Although nearly all of the cases which have construed that section are civil, it applies to criminal proceedings as well. See e.g., *Commonwealth v. White*, 358 Mass. 488, 491 (1970).

The rule states that a court shall notice foreign law upon request when that law is material. This is not intended to limit a court's authority under § 70 to notice foreign law in the absence of a request if the court so chooses. *Dicker v. Klein*, 360 Mass. 735, 736-37 (1972); *De Gategno v. De Gategno*, 336 Mass. 426, 431 (1957). Even upon request, however, a court is not required to notice foreign law unless it is brought to the attention of the court. *Tsacoyeanes v. Canadian Pac. Ry. Co.*, 339 Mass. 726 (1959). Massachusetts practice is in accord with Fed.R.Evid. 201 which states that “(c) . . . A court may take judicial notice, whether requested or not [and] (d) . . . shall take judicial notice if requested by a party and supplied with the necessary information.” See Me.R.Evid. 201 (c)-(d).

When a party does make a request for the court to take judicial notice of foreign law, that party carries the burden of proof as to what the law is. *Finer v. Steuer*, 255 Mass. 611 (1926). The attention of the court may be directed to the law of another jurisdiction by oral

testimony of a qualified witness as well as by citation of statutes and decisions. *Eastern Offices, Inc. v. P. F. O’Keefe Ad. Agency, Inc.*, 289 Mass. 23 (1935). The requirement of bringing the law to the attention of the court and proving it is not satisfied by simply mentioning the appropriate reference to foreign law. “Merely to direct attention to the law of a foreign country written in a foreign tongue does not make it a matter for judicial knowledge.” *Rodrigues v. Rodrigues*, 286 Mass. 77, 83 (1934). However, where there is not sufficient information available to the litigants as to what is the pertinent foreign law, the court may use other channels available to it in order to determine the law. In *Mazurowski, petitioner*, 331 Mass. 33 (1954), the court drew upon the superior sources of foreign law and regulations available through the State Department, to which neither party to the litigation has access.

## Rule 40: Proof of Official Records

(Applicable to District Court and Superior Court)

### (a) Authentication

#### *(1) Domestic*

An official record kept within the Commonwealth, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by his deputy. If the record is kept in any other state, district, commonwealth, territory or insular possession of the United States, or within the Panama Canal Zone or the Trust Territory of the Pacific Islands, any such copy shall be accompanied by a certificate that such custodial officer has the custody. This certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

#### *(2) Foreign*

A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of

embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification, or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

## (b) Lack of Record

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

## (c) Other Proof

This rule does not prevent the proof, by any other method authorized by law, of the existence of, or the lack of, an official record, or of entry, or lack of entry therein.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

### (1979)

This rule is identical to Mass. R. Civ. P. 44. See Fed. R. Crim. P. 27, which incorporates by reference the provisions of Fed.R.Civ.P. 44.

Prior to the promulgation of this rule, no statute or rule expressly provided for the proof of official records in criminal cases. The practice developed of utilizing the law applicable to the proof of such records in civil cases. Rule 40 formally recognizes that practice.

Like its civil counterpart, Rule 40 is addressed only to authenticating an official record or establishing the lack thereof. It does not govern the authentication of unofficial records, nor does it regulate the extent to which the contents of an authenticated official record are admissible.

The term “official record” has been defined generally as including records of any governmental entity, 8A J. Moore, Federal Practice para. 27.02 at 27-6 (1978), and more

particularly as “all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices . . . .” *Olender v. United States*, 210 F.2d 795, 801 (9th Cir. 1954). See Fed.R.Evid. 901(b)(7), 902(1)-(3).

### Subdivision (a)

It should be noted that subdivision (a)(1), unlike its federal counterpart, does not require certification by a judge or other officer of the status of the custodial official if the records are kept within the Commonwealth. As for domestic records kept outside the Commonwealth (subdivision [a][1]) and foreign records (subdivision [a][2]), the requirement of double certification is retained. Subdivision (a)(2) is in all other respects in accord with former Massachusetts practice.

### Subdivision (b)

This subdivision permits the written statement of a custodial officer that no particular record can be found, authenticated pursuant to subdivision (a), to suffice as proof that no such record exists.

### Subdivision (c)

Rule 40(c) incorporates all pre-existing statutory methods of proving the existence of, or lack of the existence of, official records. Those statutes are unaffected by the promulgation of this rule. See, e.g., G.L. c. 46, § 19 (records relative to birth, marriage, and death); G.L. c. 233, §§ 76, 76A, 76B (records of departments of government).

## Rule 41: Interpreters and Experts

(Applicable to District Court and Superior Court)

The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor.

### Rule History

*Effective July 1, 1979.*

### Reporter’s Notes

(1979)

This rule is an abbreviated version of Fed. R. Crim. P. 28 as it appeared prior to amendment in 1975. Federal Rule 28 now deals only with interpreters; the provisions governing expert



witnesses, formerly Federal Rule 28(a), are now contained in Fed.R.Evid. 706. See Maine R.Crim.P. 28.

The right of a defendant to be present at trial, see e.g., *Lewis v. United States*, 146 U.S. 370, 372 (1892)—in the sense of being able to comprehend and participate meaningfully in the proceeding, *United States ex. rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970)—the requirement that a defendant have “sufficient . . . ability to consult with his lawyer with a reasonable degree of rational understanding,” *Dusky v. United States*, 362 U.S. 402 (1960), and the sixth amendment right to be confronted with adverse witnesses, applicable to the states through the fourteenth amendment, *Pointer v. Texas*, 380 U.S. 400 (1965), mandate that an interpreter to be available to the defendant or witness who cannot effectively communicate. “Otherwise, ‘[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object.’” *United States ex rel. Negron*, supra at 389, quoting Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458 (1969).

Whenever an interpreter is placed between the witness and counsel, the judge, and the jury, problems of distortion and confusion may arise. For example, where some of the jurors understand the language of the witness and the judge or counsel does not, the jurors may hear testimony that should have been excluded. The Supreme Judicial Court has suggested the following:

1. Counsel should address his questions to the witness in the second person, and not to the interpreter.
2. The interpreter should translate the question exactly without any additional or supplementary remarks of his own.
3. The interpreter should then translate the answer of the witness in the first person, neither editing nor adding to the witness’ words. Even if the answer is non-responsive, the interpreter should give it and allow the judge to pass on its admissibility, for the interpreter’s sole function is to translate.
4. Extraneous conversations between the witness and the interpreter should not be permitted. If such conversations do occur for some reason, they should be translated into English for the judge and counsel to hear.
5. When there are sitting on the jury individuals who understand the language of the witness, they are to be instructed that it is the interpreted testimony in English that is evidence and not their own translations of the witness’ answers.
6. Neither party has the right to have a juror excused solely because that juror understands the language of a witness. However, in certain circumstances the judge in his discretion may decide whether to excuse such a juror is appropriate. For example, this action may be desirable on motion of the defendant in a criminal

matter in which the progress of the trial will not be interrupted by the removal of the juror, sufficient alternate jurors have been empaneled, and interpreted testimony constitutes a major part of the case.

*Commonwealth v. Festa*, 369 Mass. 419, 429-30 (1976) (footnote omitted).

While the Supreme Court has established that it is within the discretion of the court whether to appoint an interpreter, *Perovich v. United States*, 205 U.S. 86, 91 (1907), it has not found a right to state-provided interpreters to be a constitutional absolute since that issue has never been squarely presented. Lower federal courts have held, however, that if the court is put on notice that a defendant has a language difficulty, the court must make it unmistakably clear to him that he has the right to have a competent translator assist him, at state expense if he is indigent, throughout the proceeding. *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974); *United States ex rel. Negron v. New York*, 434 F.2d 386, 390-91 (2d Cir. 1970). Conversely, if the need for an interpreter's services is not apparent nor are such services requested, it is no abuse of discretion to fail to advise a defendant of their availability. *United States v. Barrios*, 457 F.2d 680, 682 (9th Cir. 1972).

The justices of the Superior Court, G.L. c. 221, § 92, the Boston Municipal Court, G.L. c. 218, § 67, and the East Boston District Court, G.L. c. 218, § 68, may appoint official interpreters for the sessions of those courts. Other District Courts may employ interpreters as the need therefor arises. G.L. c. 262, § 32. Interpreters are to be compensated for their services by the Commonwealth. G.L. c. 221, §§ 92, 92A; c. 262, § 32. The appointment of interpreters in civil actions is governed by Mass. R. Civ. P. 43(f).

The federal rule does not indicate that it was intended to benefit only the indigent defendant.

The view that the Rule should be restricted overlooks the fact that the interpreter's services, though required by the defendant's own language problem, benefit the court and prosecution as well as the defense. The integrity of the judicial process—not to mention the desirability of avoiding collateral attacks—demands an accurate and impartial translation. Such a translation can only be guaranteed by court appointment of interpreters.

8A. J. Moore, *Federal Practice* Para. 28.02[2] at 28-3 (1978). But see *United States v. Desist*, 384 F.2d 889, 901-03 (2d Cir. 1967) aff'd on other grounds, 394 U.S. 244 (1969). Former practice in Massachusetts appeared to be that interpreters, unless retained by non-indigent defendants, were paid by the court. Official interpreters are expressly barred from receiving gratuities, bonuses or fees beyond that compensation paid by the Commonwealth. G.L. c. 218, § 67; c. 221, § 92.

The use of interpreters is not limited to situations where the defendant or a witness is not English-speaking. General Laws c. 221, § 92A provides for the appointment of interpreters for the deaf. The court in *United States v. Addonizio*, 451 F.2d 49, 68 (3d Cir.), cert. denied, 405 U.S. 936 (1972), held that the appointment as interpreter of the wife of a witness whose illness made his speech difficult to understand was not an abuse of discretion. See *Fairbanks v. Cowan*, 551 F.2d 97 (6th Cir. 1977) (father of retarded adult). The appointment of such a person should only be after a finding that he is disinterested in the outcome of the case. *United States v. Addonizio*, supra; *Price v. Beto*, 426 F.2d 875 (5th Cir. 1970) (appointment of husband of deaf-mute victim held violative of due process). See Maine R.Crim.P. 28, which provides for appointment of a “disinterested” interpreter of the court’s own selection.

The courts’ power to appoint expert witnesses to assist the indigent defendant or the court itself is nowhere express; rather, it is grounded upon the long-standing belief “that it is for the interest of the Commonwealth . . . that all proper investigations should be made, in order to guard against the danger of doing injustice to the prisoner . . .” Attorney General, petitioner, 104 Mass. 537, 544 (1870). The Supreme Judicial Court has approved the practice of the trial judge’s authorization, on a proper showing, of an indigent defendant to expend public funds for expert assistance. See *Commonwealth v. Silva*, 371 Mass. 819, 821 (1977) (psychiatric expert).

Under Superior Court Rule 54 (1974), the court is not to allow compensation for the services of an expert witness unless his employment by the defendant was authorized by the court. If the compensation of defense experts is approved by the court, it is paid by the Commonwealth. G.L. c. 280, §§ 4, 16; c. 261, §§ 27A-G.

Pursuant to G.L. c. 261, § 27B, applicable by its terms to criminal cases, a defendant may file an affidavit of indigency and request waiver, substitution or payment by the Commonwealth of costs and fees. Substitution means that if an alternative to a translator is available at lower or no cost, the judge may order that this alternative be used if it is “substantially equivalent . . . and does not materially impair the rights of any party.” G.L. c. 261, § 27F. If, after hearing, the court finds that certain services are “reasonably necessary to assure the [defendant] as effective a . . . defense as he would have if he were financially able to pay,” the court must grant the defendant’s request for payment by the Commonwealth of “extra fees and costs,” defined in G.L. c. 261, § 27A as including “expert assistance.”

The indigent defendant cannot as of right nominate the expert whom he wishes to employ, *Commonwealth v. Erickson*, 356 Mass. 63 (1969); *Commonwealth v. Medeiros*, 354 Mass. 193, 199-200 (1968), cert. denied sub nom., *Bernier v. Massachusetts*, 393 U.S. 1058

(1969), but in practice most judges will permit the defendant to specify an expert, although a ceiling may be established on the amount which may be expended. 30 Mass. Practice Series (Smith) § 492 (1970, Supp. 1978).

In addition to appointing experts to assist the defendant in the preparation or presentation of his defense, the court is empowered to call experts on its own motion to aid in its determination of issues of fact or law. See *Commonwealth v. Lykus*, 367 Mass. 191 (1975) (Separate opinion of Kaplan J., 206 at 213).

## Rule 42: Clerical Mistakes

(Applicable to District Court and Superior Court)

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be corrected with leave of the appellate court.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

**(1979)**

This rule is substantially identical to Mass. R. Civ. P. 60(a). See Fed. R. Crim. P. 36; Fed.R.Civ.P. 60(a).

Rule 42 is limited to the correction of “clerical mistakes” or errors “arising from oversight or omission” and does not apply to the correction of errors of substance, such as an illegal sentence or improperly obtained conviction. The federal criminal analogue is said to be typically invoked when the court has authority to impose consecutive as well as concurrent sentences, but the record is ambiguous as to which was in fact given. 8A J. Moore, *Federal Practice* Para. 36.02 at 36-1 n.1 (1978). See e.g., *Borum v. United States*, 409 F.2d 443, 439-41 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1968).

Errors which may be corrected pursuant to this rule must arise out of “misprisions, oversights, omissions, unintended acts or failures to act,” *First Nat’l. Bank v. National*

Airlines, 167 F. Supp. 167, 169 (S.D.N.Y. 1958) (construing Fed.R.Civ.P. 60[a]), and not result from deliberate action, *Ferrao v. Arthur M. Rosenberg Co.*, 156 F.2d 212 (2d Cir. 1946). See 8 Mass. Practice Series (Smith & Zobel) Reporters' Notes at (1977).

Clerical mistakes are due to a failure to accurately record statements made or action taken by the court or parties. E.g., *Costello v. United States*, 252 F.2d 750 (5th Cir. 1958). 8A J. Moore, Federal Practice Para. 36.02 at 36-2 (1978). Errors which are due to oversight or omission generally require correction so as to conform to the intent of the court or a party which may not be reflected in their recorded statements. E.g., *Green v. Clerk of Mun. Ct.*, 321 Mass. 487 (1947); *Lott v. United States*, 309 F.2d 115 (5th Cir. 1962); cert. denied, 371 U.S. 950 (1963). But cf. *United States v. Raftis*, 427 F.2d 1145 (8th Cir. 1970); 8A J. Moore, *supra* at 36-2.

The term "record" is intended to be broadly read so as to encompass not only process, pleadings, and verdict, but also evidentiary documents, testimony, instructions and all other matters pertaining to the case of which there is a written record. 8 Mass. Practice Series, *supra* at 461; 8A J. Moore, *supra* at 36-2.

The entry of an appeal does not divest the trial court of its power to correct error. If the case has been docketed in the appellate court, the trial court is still empowered to correct error, but only with permission of the appellate court. See 8 Mass. Practice Series, *supra* at 461; Fed.R.App.P. 10(a), (e).

## Rule 43: Summary Contempt Proceedings

(Applicable to District Court and Superior Court)

### (a) When Warranted

A criminal contempt may be punished summarily when

- (1) summary punishment is necessary to maintain order in the courtroom;
- (2) the contemptuous conduct occurred in the presence of, and was witnessed by, the presiding judge;
- (3) the presiding judge enters a preliminary finding at the time of the contemptuous conduct that a criminal contempt occurred; and
- (4) the punishment for each contempt does not exceed three months imprisonment and a fine of \$2,000.

## (b) Procedure

### (1)

Upon making a preliminary finding that a criminal contempt occurred, the presiding judge shall give the alleged contemnor notice of the charges and shall hold a hearing to provide at least a summary opportunity for the alleged contemnor to produce evidence and argument relevant to guilt or punishment. For good cause shown, the presiding judge may continue the hearing to enable the contemnor to obtain counsel or evidence.

### (2)

The presiding judge may order the alleged contemnor held, subject to bail and/or conditions of release, pending the hearing provided for in subsection (b)(1) if the judge finds it necessary to maintain order in the courtroom or to assure the alleged contemnor's appearance.

### (3)

#### (i)

If, after the hearing provided for in subsection (b)(1), the presiding judge determines that summary contempt is not appropriate because the appropriate punishment for the alleged contempt exceeds three months imprisonment and a fine of \$2,000, the judge shall refer the alleged contemnor for prosecution under Rule 44. If necessary to maintain order in the courtroom or to assure the alleged contemnor's appearance, the judge may order the alleged contemnor held, subject to bail and/or conditions of release, for a reasonable period of time, not to exceed 15 days absent good cause shown, pending the issuance of a complaint or indictment under Rule 44(a).

#### (ii)

If, after the hearing, the presiding judge determines that summary contempt is not appropriate because one or more of the requirements in subsection (a)(1), (a)(2), or (a)(3) is not satisfied, or for another reason, the judge shall discharge the alleged contemnor. The judge, in his or her discretion, may refer the matter to the government for investigation and possible prosecution, and nothing in this subsection shall preclude such investigation or prosecution, whether undertaken in response to the judge's referral or independently.

#### (iii)

If, after the hearing, the presiding judge determines that summary contempt is appropriate, the judge shall make a finding on the record of summary contempt, setting forth the facts

upon which that finding is based. The court shall further announce a judgment of summary contempt in open court, enter that judgment on the court's docket, and notify the contemnor of the right to appeal. The judge may defer sentencing, or the execution of any disposition, where the interests of orderly courtroom procedure and substantial justice require. If necessary to maintain order in the courtroom or to assure the contemnor's appearance, the judge may order the contemnor held, subject to bail and/or conditions of release, pending sentencing.

## (c) Appeal

A contemnor may appeal a judgment of summary contempt to the Appeals Court.

## Rule History

*Amended October 30, 2013, effective January 1, 2014; amended February 22, 2022, effective April 1, 2022.*

## Reporter's Notes

### (2022)

The amendment to Rule 43(b)(3)(iii) implements the terminological change from “sentence” to “disposition” required by *Commonwealth v. Beverly*, 485 Mass. 1 (2020).

### (2014)

This amendment to Rule 43 is intended to clarify the procedures by which a judge can impose summary punishment for criminal contempt or, alternatively, refer an alleged contemnor for prosecution by complaint or indictment under Rule 44. See *Vizcaino v. Commonwealth*, 462 Mass. 266, 279 n. 11 (2012) (suggesting a need for clarification in the operation of Rule 43). Amended Rule 43 resolves ambiguities concerning the prerequisites for summary punishment of contempt and the procedural steps in a summary-contempt proceeding. Further, amended Rule 43(b) explicitly recognizes discretionary authority that judges have presumably enjoyed in summary contempt proceedings, principally the common-law authority to hold an accused contemnor if necessary to maintain courtroom order or to assure his or her appearance at any subsequent proceeding. The amended rule also increases the maximum fine permitted from \$500 to \$2,000.

## Rule 43(a) When Warranted

Amended Rule 43(a), like its predecessor, provides for the four conditions necessary to warrant summary punishment for contempt. Such punishment must be necessary to

maintain courtroom order; the contemptuous conduct must occur in the presence of and be witnessed by the judge; the judge must enter a finding of contempt at the time it occurs; and the punishment cannot exceed three months' imprisonment and a fine of \$2,000. As discussed below, amended Rule 43(a)(3) clarifies an ambiguity in former Rule 43(a), the amended rule expressly providing that this threshold, contemporaneous finding of contempt be preliminary. As such, it gives notice to the alleged contemnor of the charges, but it is subject to reconsideration after affording the alleged contemnor an opportunity to be heard as required under Rule 43(b)(1).

Former Rule 43(a)(2) referred to the threshold, contemporaneous finding as a "judgment of contempt," leading to possible confusion between it and the final "judgment of contempt" which, under former Rule 43(b), the judge could make only after "giv[ing] the contemnor notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment." Mass. R. Crim. P. 43, 378 Mass. 919 (1979). See *Vizcaino v. Commonwealth*, 462 Mass. 266, 276 (2012) (holding that an opportunity to be heard followed by entry of the judgment on docket are necessary predicates to a Rule 43 judgment of summary contempt); *Commonwealth v. Segal*, 401 Mass. 95, 99-100 (1987) (same). Amended Rule 43(a)(3) makes it clear that the judge's threshold, contemporaneous finding of contempt is preliminary. While the Supreme Judicial Court had read former Rule 43(a)(2) to provide that this preliminary "judgment of contempt" be written, see *Vizcaino v. Commonwealth*, 462 Mass. 266, 272 & n. 7 (2012) (interpreting Rule 43(a)'s contemporaneity requirement to permit reasonable, minor delays in preparing Rule 43(a)(2)'s written judgment of contempt), amended Rule 43(a)(2) neither provides nor contemplates that the preliminary finding of contempt be written. Such a requirement seems unnecessary given that the judge's finding is in open court and presumably subject to transcription if necessary. Moreover, requiring a written finding could delay both the alleged contemnor's opportunity to be heard and the trial in which the contemptuous conduct occurred. Finally, as noted, the amended rule increases the maximum fine for summary contempt from \$500 to \$2,000, an increase that partially accounts for the inflation that has occurred since the rule's adoption in 1979. This maximum fine is well within the punishment that may be imposed without implicating the Sixth Amendment right to a jury trial. See *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 544-45 (1989) (holding no Sixth Amendment right to jury trial for offense the maximum punishment for which was six months imprisonment and \$1,000 fine, noting the possible fine was "well below" the \$5,000 federal benchmark utilized in identifying petty offenses that can be tried without a jury); *Furtado v. Furtado*, 380 Mass. 137, 142 n. 5 (1980) (noting Supreme Judicial Court has not interpreted article 12 to impose a stricter jury-trial requirement).



## Rule 43(b) Procedure

As did former Rule 43(b), amended Rule 43(b)(1) provides that, following the preliminary finding of contempt under Rule 43(a)(3), the judge must conduct a hearing, affording the accused contemnor at least a summary opportunity to produce evidence and/or argument relevant to guilt or punishment. The amended rule further gives the judge discretion, for good cause shown, to continue the hearing so that the accused contemnor can obtain evidence or counsel.

Rule 43(b)(2) authorizes the judge to hold the accused contemnor, subject to bail and/or conditions of release, pending the summary-contempt hearing if necessary to maintain courtroom order or to assure the contemnor's appearance. Judges presumably had such common-law authority under former Rule 43, see *In re Terry*, 128 U.S. 289, 307-13 (1888) (recognizing longstanding judicial authority to apprehend, commit, and summarily punish one who engages in contemptuous conduct in the judge's presence); see also G.L. c. 276, § 57 (authorizing justices of the superior and district courts to admit a committed prisoner to bail upon finding that such release will reasonably assure the prisoner's future appearance before the court), but the amended rule makes it explicit.

Amended Rule 43(b)(3) sets out the respective procedures for the three possible results of the Rule 43(b)(1) hearing.

First, under Rule 43(b)(3)(i), if the judge determines that summary contempt is not appropriate because the accused contemnor deserves greater punishment than that permitted for summary contempt, the judge must refer the alleged contemnor for prosecution by complaint or indictment under Rule 44. In that event, if necessary to maintain courtroom order or the appearance of the accused, the rule recognizes the judge's common-law authority to hold the alleged contemnor subject to bail and/or conditions of release for up to 15 days, extendable for 3 good cause shown, pending issuance of the contempt complaint or indictment under Rule 44(a). Although the judge has wide discretion in determining what constitutes good cause to extend the 15-day limitation, it would ordinarily include a superior court referral in which there is no grand jury in session during that 15-day period.

Second, Rule 43(b)(3)(ii) covers the case in which, after considering the facts and arguments presented in the summary-contempt hearing, the judge decides for whatever reason that summary contempt is not appropriate. This possibility, although inferable under former Rule 43(b), is here explicit. Under Rule 43(b)(3)(ii), such a decision to forgo further proceedings and to discharge the alleged contemnor does not bar the alleged contemnor's prosecution for the alleged contempt. The rule explicitly provides that, in spite

of this termination of summary-contempt proceedings, the judge has discretion to refer the matter to the government for investigation and possible prosecution, and that, even in the absence of such a judicial referral, the government may investigate and prosecute the alleged contempt. Cf. *Vizcaino*, 462 Mass. at 274-75 (holding that, where judge had not entered summary contempt judgment on the court's docket as required by Rule 43(b), further prosecution for nonsummary contempt under Rule 44 not barred by double jeopardy).

Third, Rule 43(b)(3)(iii) sets out the procedure if, after the hearing, the judge decides that summary punishment for the contempt is appropriate. The judge must make a finding of summary contempt on the record, setting out the facts on which it is based. Unlike former Rule 43(b), this finding need not be written; a transcript of the factual finding provides an adequate record for purposes of appeal. The rule further provides that, as in any criminal conviction, the court must announce the summary-contempt judgment in open court, enter the judgment on the docket, and notify the contemnor of the right to appeal. See *Mass. R. Crim. P. 28(a)*, 378 Mass. 898 (1979). As did former Rule 43(b), Rule 43(b)(3)(iii) allows the judge discretion to defer summary-contempt sentencing or its execution where orderly courtroom procedure and substantial justice require. Although the rule does not explicitly limit the purpose or length of such sentence deferral, as was so under former Rule 43(b), it ordinarily would be reserved for cases of summary contempt by one of the parties or lawyers in the trial, see *Taylor v. Hayes*, 418 U.S. 488, 497-98 (1974), and imposition or execution of sentence would be deferred until after the trial is completed. The rule further permits the judge, if necessary, to order the contemnor held, subject to bail and/or conditions of release, pending sentencing.

Rule 43(c), providing for the right of appeal to the Appeals Court, remains in substance unchanged.

## (1979)

Rule 43 is based upon Fed. R. Crim. P. 42(a) as that rule was affected by the Supreme Court decision of *Bloom v. Illinois*, 391 U.S. 194 (1968), and upon Fla.R.Crim.P. 3.830 (1975).

*Bloom v. Illinois*, supra, signaled a departure from the traditional approach to adjudicating criminal contempt. The Court's guidelines established in *Bloom*, which have been consistently followed and clarified since the issuance of the opinion, comprise the substance of this rule.

In *Bloom* the Court de-emphasized the long-standing distinction between so-called direct and indirect contempt, focusing instead on the issue of potential penalty. Beginning with the premise that criminal contempts are so similar to other criminal proceedings as to be

in their practical—and constitutional—aspects indistinguishable, and following its decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that while summary punishment of criminal contempt may be necessary to preserve the dignity and efficacy of the judicial process, those interests are outweighed by the need to provide the defendant with all the procedural safeguards deemed fundamental in our judicial system. The Court concluded that a defendant charged with a serious contempt, whether direct or indirect, is entitled to a full jury trial.

## Subdivision (a)

In *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), the Court stated that “where the necessity of circumstances warrants, a contemnor may be summarily tried . . . .” *Id.* at 514. The Court recognized, however, that where “there is no overriding necessity for instant action to preserve order . . . . [there is] no justification for dispensing with the ordinary rudiments of due process.” *Id.* at 515. The present rule incorporates that principle: summary proceedings are available only when they are necessary to preserve order. Accord *Sussman v. Commonwealth*, Mass. Adv. Sh. (1978) 754, 758.

By limiting the use of summary disposition of contempts to those cases where the alleged contemptuous conduct was committed in the presence of the trial judge, subdivision (a)(1) conforms to the common law practice based on the direct-indirect contempt distinction and to practice under Fed. R. Crim. P. 42(a). One basis for the common law principle is that the judge cannot determine the facts surrounding an allegation of contempt without a hearing unless he personally viewed the contemptuous conduct.

Subdivision (a)(2) stems from the principle expressed in *Taylor v. Hayes*, 418 U.S. 488 (1974), that when the adjudication of contempt is delayed until after the contemptuous conduct has occurred, summary disposition is improper. Although in most cases the same principle would apply when the punishment is delayed, the Supreme Court recognized that in some cases, particularly those involving lawyers, summary punishment is permissible when the punishment alone has been delayed.

Subdivision (a)(2) goes beyond the minimum constitutional requirements that must be afforded to contemnors. *Taylor v. Hayes*, *supra*, expressly allows the court to punish without a full scale trial, though it disallows summary disposition of contempts when the judgment of contempt is not entered contemporaneously with the commission of the contempt. Accordingly, under this rule, a trial is required in such situations. The rationale for such requirement is that where necessity does not demand immediate action, a contemnor is to have the same rights as other criminal defendants. See *Commonwealth v. Sussman*, Mass. Adv. Sh. (1978) 754, 758-59.

Courts have generally defined serious contempt to mean one for which in excess of six months' imprisonment may be imposed, *Duncan, supra*, or for which a fine or more than \$500 may be levied, *United States v. Polk*, 438 F.2d 377 (6th Cir. 1971). The Supreme Court has not addressed the specific question whether and in what circumstances—if at all—“the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial.” *Muniz v. Hoffman*, 422 U.S. 454, 476 (1975). *Muniz* has been read narrowly so as to preserve the traditional standard of \$500 as constituting serious contempt. *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976).

Subdivision (a)(3) reflects this demarcation between serious and petty offenses. Any contempt which the trial judge would punish by a sentence of at least three months cannot be tried summarily and must be tried before a jury if the contemnor so elects. See Mass. R. Crim. P. 45(a)-(b).

*Codispoti v. Pennsylvania, supra*, imposes a further restriction on the availability of summary proceedings that relates to the six-month rule. Where the adjudication of contempt is delayed until after trial and where there are at least two sentences imposed that are consecutive and cumulate more than six months, summary proceedings are not available. This is an interpretation of the six-month rule adopted by *Bloom* and subsequent cases as applied to consecutive sentences for contempt imposed at one trial. This limitation does not apply where the judgments of contempt are entered serially during the progress of the trial as the contemptuous conduct occurs. *Codispoti v. Pennsylvania, supra* at 513-15. Sentences will be aggregated for purposes of the six-month rule, however, where the citations for contempt occur during trial but imposition of sentences is delayed until the conclusion thereof. *United States v. Prewitt*, 553 F.2d 1082, 1087-90 (7th Cir. 1977). The foregoing principles, while fully applicable under this rule, are to be read in terms of three months as dictated by subdivision (a)(3).

## Subdivision (b)

This subdivision outlines the procedures to be followed in a summary adjudication of contempt. While these procedures go beyond the minimum requirements of due process set out in *Taylor v. Hayes*, they do comport with suggestions by the Supreme Court as to the proper procedure to be followed.

“Summary punishment always, and rightly, is regarded with dis-favor,” *Sacher v. United States*, 343 U.S. 1, 8 (1952). Accord *Taylor v. Hayes, supra*, at 497-98; *Groppi v. Leslie*, 404 U.S. 496, 502-05(1972). Unless the contempt occurs in the presence of the judge and immediate punishment is needed to prevent demoralization of the court's authority or to enforce lawful orders essential to prevent a breakdown of the proceedings, many of the due

process safeguards available in criminal proceedings should apply to a contempt proceeding. *Sussman v. Commonwealth*, Mass. Adv. Sh. (1978) 754, 758. Except in cases of flagrant contemptuous conduct, the trial judge should not exercise the power of summary contempt in the absence of a prior warning as to the conduct which will place the offender in contempt. *Sussman*, supra at 759. If an adjudication of, and punishment for, contempt is carried out summarily, the contemnor is denied an opportunity to present facts in mitigation of the charge. See *Groppi v. Leslie*, supra, 503, 505. It is for this reason that a contemnor should in all cases be given notice and granted at least a summary opportunity to present evidence on his own behalf. An adequate opportunity to defend or explains one's conduct is a minimum requirement before imposition of punishment. *Sussman*, supra, at 762. As stated in the ABA Standards Relating to the Function of the Trial Judge, § 7.4, comment at 95 (Approved Draft, 1972):

*Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, Ex parte Terry, 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course.*

The last sentence of subdivision (b) is intended to cover those “circumstances, particularly where the offender is a lawyer representing a client on trial . . . [where summary punishment] may be postponed until the conclusion of the proceedings.” *Taylor v. Hayes*, supra at 498. See *Sussman v. Commonwealth*, supra at 762-63.

It should be recognized that the power to punish for contempt is to be used cautiously and is not an appropriate device to control every act of courtroom disrespect. This rule is intended to authorize summary punishment only for disruptive conduct that is willfully contemptuous and that has been preceded by a prior warning in all but the most flagrant violations. See ABA Standards Relating to the Function of the Trial Judge § 7.2, comment at 93 (Approved Draft, 1972); *United States v. Wilson*, 421 U.S. 309 (1975).

## Subdivision (c)

The elimination of the writ of error by Rule 30 necessitated a change in the method of review provided for in criminal contempt cases. Formerly, under G.L. c. 250, § 9, a sentence to punish for criminal contempt was a judgment in a criminal case which could be reexamined upon a writ of error. *Hansen v. Commonwealth*, 344 Mass. 214, 216 (1962); *Dolan v. Commonwealth*, 304 Mass. 325, 328 (1939). Review was limited to errors of law and matters of fact not heard and decided at the trial under review. *Blankenburg v. Commonwealth*, 260 Mass. 369, 376-77 (1927).

Subdivision (c) establishes the taking of an appeal as the sole means of review for criminal contempts. Review by appeal has already gained a foothold in Massachusetts practice for contempt findings against witnesses who have been previously granted immunity and have refused to testify. G.L. c. 233, § 20H. Under subdivision (c) review will be by the Appeals Court.

## Rule 44: Contempt

(Applicable to District Court and Superior Court)

### (a) Nature of the Proceedings

All criminal contempts not adjudicated pursuant to Rule 43 shall be prosecuted by means of complaint, unless the prosecutor elects to proceed by indictment. Except as otherwise provided by these rules, the case shall proceed as a criminal case in the court in which the contempt is alleged to have been committed.

### (b) Special Provisions for District Court

The District Court shall have jurisdiction to try all contempts committed therein except those prosecuted by indictment. Whenever a contemnor asserts his right to a jury trial in District Court, the trial shall be held before a jury in District Court. The contemnor's only right of appeal shall be to the Appeals Court.

### (c) Disqualification of the Judge

The contempt charges shall be heard by a judge other than the trial judge whenever the nature of the alleged contemptuous conduct is such as is likely to affect the trial judge's impartiality.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

(1979)

Contempts that are not or cannot be tried summarily in accordance with Rule 43 must be tried under the provisions of Rule 44. Rule 44 carries the recent developments in the law of

contempt to a logical conclusion by requiring all contempts not summarily tried to be prosecuted under the procedures established for the trial of other criminal offenses.

In any alleged contempt to be adjudicated pursuant to this rule, the defendant has the right to a jury trial. *Bloom v. Illinois*, 391 U.S. 194 (1968), adopted the standard established in *Duncan v. Louisiana*, 391 U.S. 145 (1968) for determining when the right to a jury trial accrues to a defendant and applied that standard to criminal contempt. Duncan accepted the established rule that maximum sentences of under six months denote petty offenses. It was established in *Baldwin v. New York*, 399 U.S. 66, 69 (1970), that authorized maximum punishment of greater than six months indicated a serious offense. Since the maximum punishment for contempt is often not regulated by statute, the determination of whether a particular contempt charge is a serious or petty offense is to be made with reference to the penalty actually imposed. See *Bloom v. Illinois*, *supra* at 211, *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974). Under Mass. R. Crim. P. 43(a)(3), that reference will be to whether the sentence exceeds three months' imprisonment or a fine of \$500.

Initiation of prosecution by complaint is an historically recognized manner of bringing charges for indirect contempt in the Commonwealth. *Dolan v. Commonwealth*, 304 Mass. 325, 337 (1939). See generally the cases cited by the Court in *Dolan* for further similarities existing between prosecutions for indirect contempt and other criminal prosecutions.

One exception to the claim of similarity between a contempt prosecution under this rule and other criminal prosecutions should be noted: the right to indictment by grand jury, to which contemnors are not entitled to present, is not to be extended to them by interpreting this rule broadly. In ordinary criminal prosecutions, a defendant has the right to indictment for those crimes punishable by a term in the state prison. *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 350 (1857). General Laws c. 220, § 14, as interpreted by the Court in *Hurley v. Commonwealth*, 188 Mass. 443, 448 (1905), precludes contempt commitments other than to the "common jail." Since the maximum term of imprisonment in a jail or house of correction is set at two and one-half years by G.L. c. 279, § 23, and since no grand jury indictment is required to confine a defendant for that period of time (see Mass. R. Crim. P. 3, Complaint; Indictment), it is apparent that no right to prosecution by indictment exists in contempt cases. Federal case law is in accord on this point. *Green v. United States*, 356 U.S. 165, 183 (1958); *United States v. Eichhorst*, 544 F.2d 1383, 1386 (7th Cir. 1976); *Mitchell v. Fiore*, 470 F.2d 1149, 1153 (3rd Cir. 1972); *United States v. Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970).

## **Rule 45: Disruptive Defendant**

(Applicable to District Court and Superior Court)

## (a) Removal of Defendant

A judge may direct that a defendant be removed from the courtroom during trial if the defendant's behavior becomes so disruptive that the trial cannot proceed in an orderly manner. The judge shall make findings on the record describing the disruptive behavior and explaining how the trial cannot proceed in an orderly manner. At the request of the defendant, the judge shall instruct the jury that the defendant's removal and absence are not to be considered by the jury.

## (b) Absence of Defendant

### *(i) By defendant's request*

If a defendant in custody refuses to be brought into the courtroom or requests to be absent from the courtroom, the trial may proceed without the defendant's presence, in the discretion of the judge.

### *(ii) Based on prior conduct*

If the defendant's prior actions provide a substantial basis for the judge to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner, the judge may request an assurance of good behavior from the defendant. If the defendant declines to provide an assurance of good behavior, the trial may proceed without the defendant's presence, in the discretion of the judge.

### *(iii) Jury instruction*

At the request of the defendant, the judge shall instruct the jury that the defendant's absence is not to be considered by the jury.

## (c) Rights of Defendant

A defendant absent from trial under this rule shall be advised that the defendant will be admitted to the courtroom upon request and assurances of good behavior. The judge shall periodically inquire of the defendant, outside the presence of the jury, whether the defendant wishes to be admitted to the courtroom and is willing to provide assurances of good behavior. The defendant shall be provided with the means to contemporaneously hear and, whenever possible, view the proceedings remotely.



# Rule History

*Effective July 1, 1979; amended August 3, 2023, effective October 1, 2023.*

## Reporter's Notes

(2023)

This rule sets forth the procedures by which a judge may remove a defendant from trial because of the defendant's disruptiveness. The rule first became effective in 1979, and these amendments bring it into conformity with the procedures in the overwhelming majority of jurisdictions that address the matter and the current experience of Massachusetts courts with remote participation. The changes from the prior rule are 1) the elimination of references to shackling or gagging a disruptive defendant, 2) the addition of a provision for the corollary problem of a defendant who refuses to enter or requests to leave the courtroom, 3) the addition of a provision for remote hearing or viewing of courtroom proceedings by a defendant who is absent under the rule, and 4) the elimination of references to gender.

This rule does not address unusual security measures a judge may in the exercise of discretion determine are necessary. See *Commonwealth v. Brown*, 364 Mass. 471, 478-480 and nn 18-20 (1973) (listing factors a judge might consider in assessing whether unusual security precautions are necessary); *Commonwealth v. Martin*, 424 Mass. 301, 307-310 (1997) (reiterating *Brown's* recommendations that such measures should be initially agreed to by custodial authorities and the parties, and that absent such agreement the judge should have a hearing with the defendant and counsel on the record to set forth reasoning for such measures); and *Commonwealth v. Rocheleau*, 90 Mass. App. Ct. 634, 637 (2016) (Trial judge's observations that defendant was "large" and in custody and that the ground floor courtroom had a publicly accessible back door were not particularized findings that "the defendant threatened violence, behaved in a threatening or disruptive manner, or otherwise posed an evident risk of flight" which could support any unusual security measures, though error was harmless.). When necessary, unusual security measures "should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact." Standard 6-3.2 of the American Bar Association's Criminal Justice Standards—Special Functions of the Trial Judge, 3rd Ed., 2000 ("Security in court facilities").

A criminal defendant has a fundamental right to be present at trial guaranteed by both the Federal and state constitutions. See *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to

be present in the courtroom at every stage of his trial.”); *Commonwealth v. Bergstrom*, 402 Mass. 534, 543 (1988) (“[I]t is a mainstay of constitutional jurisprudence in the Commonwealth that a defendant has a corollary right to be present personally throughout his trial.”). The defendant also has a right as a matter of due process to be present at all critical stages of the proceedings. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). See also Mass. R. Crim. P. 18 (Presence of Defendant).

The defendant’s right to be physically present at trial, however, can be forfeited by misconduct or waived by consent. *Allen*, 397 U.S. at 338. If the misconduct involves disruption or threatened disruption in the courtroom, the defendant can be removed from the courtroom. Mass. R. Crim. P. 45(a). If a defendant in custody refuses to enter the courtroom or requests to leave the courtroom, the defendant can thereby waive the right to be physically present and the trial may proceed in the defendant’s absence. Mass. R. Crim. P. 45(b). In either case, the decision is committed to the sound discretion of the trial judge. *Commonwealth v. Scionti*, 81 Mass. App. Ct. 266, 277 (2012). However, a judge should make particularized findings before allowing the trial to proceed in the defendant’s absence. *Rocheleau*, 90 Mass. App. Ct. at 637.

## Removal of Defendant

The first sentence of this rule comes verbatim from Standard 6-3.8 of the American Bar Association’s Criminal Justice Standards—Special Functions of the Trial Judge, 3rd Ed., 2000 (“The disruptive defendant”). While the Standard (first published in 1971-72) then states that removal is “preferable to gagging or shackling the disruptive defendant,” the overwhelming majority of jurisdictions whose rules address remedies a judge may take to control a disruptive defendant now mention only removal. See, e.g., Fed. R. Crim. P. 43(c)(1)(C). This amendment eliminates the language that “Removal is preferable to gagging or shackling the disruptive defendant,” because of the extraordinary danger presented by restricting the airway of an uncooperative or highly agitated person, because of the experience of so many other jurisdictions, and because removal and remote observation is a much safer and now more readily available alternative.

Before a judge removes a defendant because of disruptive behavior, the defendant must be warned that removal may occur if the disruptive behavior continues. *Commonwealth v. Chubbuck*, 384 Mass. 746, 751 (1981) (defendant must be “appropriately warned and continu[e] his disruptive behavior despite such warning”). See also *Commonwealth v. Senati*, 3 Mass. App. Ct. 304, 307-308 (1975) (No abuse of discretion when trial judge removed defendant from courtroom after defendant’s outbursts before the jury and his repeated refusal to answer the judge whether he would remain silent during closing

arguments). The judge removing a defendant for disruptive behavior must make particularized findings describing the behavior and explaining how the trial cannot proceed in an orderly manner due to it. A description is required as behavior may not otherwise be apparent from the record.

A judge who removes a defendant from the courtroom must advise the defendant that the defendant may return upon providing assurances of proper behavior. *Commonwealth v. North*, 52 Mass. App. Ct. 603, 618 (2001) (Judge's handling of defendant's removal was "exemplary" where court "firmly established that such tactics [of inappropriate outbursts] would not be countenanced, but promptly allowed the defendant the opportunity to return upon a promise of good behavior."). Upon the defendant's request, the jury must be instructed not to consider the defendant's absence from the trial.

## Absence of Defendant

A defendant in custody may choose to be absent from the trial by refusing to enter the courtroom or by requesting to leave the courtroom and can thereby waive the right to be physically present at trial. While the judge has discretion to proceed with the trial in the defendant's absence, because the right to be physically present at one's trial is fundamental, its waiver must be knowing and voluntary. *Commonwealth v. L'Abbe*, 421 Mass. 262, 268-269 (1995) (Defendant's daily colloquy with judge and signing a statement each day regarding waiver of his presence was an adequate waiver even at a capital trial.). A defendant who is simply absent without explanation has not thereby waived the right to be physically present at trial. *Commonwealth v. Nwachukwu*, 65 Mass. App. Ct. 112, 118 (2005) (Defendant who left courtroom at the instruction of inexperienced trial counsel after the judge ordered sequestration of the witnesses did not thereby waive right of physical presence at trial.). A defendant must be competent to waive the right to be physically present at trial, which requires the same level of competency as that required to stand trial. *L'Abbe*, 421 Mass. at 268-269.

If the defendant's prior actions provide a substantial basis for the judge to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner, the judge may request an assurance of good behavior. If the defendant refuses to provide such assurances, the judge has the discretion to proceed with the trial in the defendant's absence. In this instance, the judge need not bring the defendant into the courtroom for a warning that the trial will nevertheless proceed because this would create the very risk the judge seeks to avoid. *Scionti*, 81 Mass. App. Ct. at 277 (Trial judge's proceeding with trial without first bringing defendant in for a warning that trial would continue in his absence was not an abuse of discretion when defendant repeatedly refused to be brought in, judge gave defendant multiple opportunities to be brought into the

courtroom, and judge arranged for a communications system for defendant to remotely hear courtroom proceedings.). As with removal of a disruptive defendant, the court should make particularized findings setting forth the defendant's prior actions that provide the substantial basis to believe that the defendant's behavior will be so disruptive that the trial cannot proceed in an orderly manner.

The removal of a pro se defendant implicates the fundamental right of self-representation as well as the right to be present at trial. *Faretta v. California*, 422 U.S. 806, 834-835 n 46 (1975) ("the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"); *Commonwealth v. Means*, 454 Mass. 81, 92 n 18 (2009). Removing a pro se defendant from the courtroom necessarily means that the defendant forfeits not only the right to be physically present at trial but also the right of self-representation.

## Rights of Defendant

Whenever the defendant is absent upon the defendant's request, the judge must advise the defendant that the defendant may be admitted upon request. Whenever the defendant is absent by removal or because of prior actions, the judge must advise the defendant that the defendant may be admitted upon providing assurances of good behavior. The judge must periodically inquire of the defendant, outside the presence of the jury, whether the defendant wishes to be admitted to the courtroom and is willing to provide assurances of good behavior. See *North*, 52 Mass. App. Ct. at 618 and n 15 ("The judge firmly established that such [disruptive] tactics would not be countenanced, but promptly allowed the defendant the opportunity to return upon a promise of good behavior" by "sending a note through the court officers after only a few minutes inquiring whether the defendant was prepared to come back and sit quietly."). The absent defendant must be provided means to hear and, if it is possible, observe proceedings in the courtroom. See *Scionti*, 81 Mass. App. Ct. at 281 (noting judge's arrangement for audio link between court room and defendant's cell, and for presence of second attorney outside defendant's cell to facilitate communication between defendant and trial counsel).

## (1979)

Rule 45 is drawn from § 6.8 of the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972), but differs in that the rule requires that at the time of removal the defendant is to be informed of his right to return upon his request and assurance of good conduct. Section 4.1 of the ABA Standards Relating to Trial by Jury (Approved Draft, 1968) in part provides the basis of subdivision (a). See Fed. R. Crim. P. 43(b)(2); Rules of Criminal Procedure (U.L.A.) rule 713(b)(3) (1974).

This rule, in conjunction with Rules 43-44, Summary Contempt and Contempt, provides a means of dealing with obstreperous defendants. In many cases the measures provided by this rule may be viewed as less drastic than invocation of the contempt power to control the unruly defendant.

While the sixth and fourteenth amendments guarantee the right of a defendant to confront the witnesses against him in a state criminal proceeding, that right has been held by the Supreme Court to be less than absolute. In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Court indicated that there was “[n]o doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct.” *Id.* at 106. In *Illinois v. Allen*, 397 U.S. 337 (1970), a unanimous Court affirmed the principle that the sixth amendment right to confront witnesses can be forfeited.

### Subdivision (a)

The *Allen* Court recognized three methods of dealing with an obstreperous defendant as constitutionally permissible: (1) binding and gagging the defendant while present in the courtroom; (2) citing the defendant for contempt; or (3) removing the defendant from the courtroom until he promises to conduct himself properly. *Id.* at 343-44.

While gagging, shackling and other unusual measures are obviously less offensive to the defendant’s right to be present at trial than his removal, such measures are not without attendant difficulties:

*These displays tend to create prejudice in the minds of the jury by suggesting that a defendant is a bad and dangerous person whose guilt may be virtually assumed; they may interfere with a defendant’s thought processes and ease of communication with counsel; intrinsically they give affront to the dignity of the trial process.*

*Commonwealth v. Brown*, 364 Mass. 471, 475 (1973) (Footnote omitted). While *Brown* dealt specifically with defendants who presented unusual security risks, the potential for prejudice to the unruly defendant is no less real, albeit mitigated perhaps by the fact that the jury will have observed the disruptive behavior and not presume guilt of the offense charged. In either case, “[w]hen special restraints are imposed, the judge’s charge to the jury should seek to quell prejudice by reasoning and warning against it.” *Commonwealth v. Brown*, *supra* at 476. Accord *Commonwealth v. Cavanaugh*, 371 Mass. 46, 58 (1977). See ABA Standards Relating to Trial by Jury § 4.1(c) (Approved Draft, 1968); ABA Standards Relating to the Function of the Trial Judge § 5.3(b)(ii) (Approved Draft, 1972).

In *Commonwealth v. Senati*, 3 Mass. App. Ct. 304 (1975), on facts similar to *Illinois v. Allen*, *supra*, the Appeals Court approved the practice of removing a defendant who refuses to

observe standards of courtroom decorum. Section 6.8 of the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972) endorses this practice as preferable to gagging or shackling the disruptive defendant.

Whether the obstreperous defendant is restrained or removed, the trial judge is to state his reasons for such action on the record. See *Commonwealth v. Brown*, supra at 479; ABA Standards Relating to the Function of the Trial Judge § 5.3(b)(i) (Approved Draft, 1972).

## Subdivision (b)

The defendant who has been removed from the courtroom is accorded certain rights by this subdivision. First, the defendant is to be kept present in the court building while his trial is in progress. This is not intended to be read literally, but rather only to require that the defendant be kept in custody within reasonable proximity to the court, i.e., in a jail or police station adjacent to the courthouse.

Further, the defendant is to be given the opportunity of learning of the progress of his trial through his counsel at reasonable intervals. ABA Standards Relating to the Function of the Trial Judge § 6.8 (Approved Draft, 1972). Where feasible, the defendant should be provided with means to monitor the proceedings. See concurring opinion of Justice Brennan in *Illinois v. Allen*, 397 U.S. 337, 351 (1970).

Secondly, the defendant is to be advised at the time of his removal of his continuing right to return upon his request and assurance of good behavior. ABA Standards, supra.

Finally, and notwithstanding the defendant's failure to request return, he is to be returned to the courtroom periodically and advised that he will be permitted to remain upon the giving of assurances of good behavior. To the ABA Standards, supra, is added the provision that the defendant is to be returned with the jury not present.

# Rule 46: Time

(Applicable to District Court and Superior Court)

## (a) Computation

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute or rule, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days,

intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes any day appointed as a holiday by the President or the Congress of the United States or so designated by the laws of the Commonwealth.

## (b) Enlargement

When by these rules or by a notice given thereunder or by order or rule of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion made after the expiration of the specified period to permit the act to be done where the failure to act was the result of excusable neglect; or (3) permit the act to be done by stipulation of the parties; but the court may not extend the time for taking any action under rules 25 and 29 except to the extent and under the conditions stated therein.

## (c) For Motions, Affidavits in Superior Court

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served on all interested parties not later than seven days prior to the hearing unless a different period is fixed by these rules or by order of the court. For cause shown, such an order may issue upon an ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits shall be served not later than one day before the hearing, unless the court permits them to be served at a later time.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

(1979)

Rule 46 is drawn from and closely parallels Mass. R. Civ. P. 6. It is substantially the same as Rule 6 of the Federal Rules of Civil Procedure and Rule 45 of the Federal Rules of Criminal Procedure. This rule does not substantially alter prior Massachusetts practice.



## Subdivision (a)

Under the common law, Sundays were excluded from the calculation of a limited time period of seven days or less; if the period exceeded seven days, Sundays were included, even if the final day for the performance of an act fell upon a Sunday. 6 Mass. Practice Series (Smith & Zobel) Reporter's Notes at 155 (1974). Like Mass. R. Civ. P. 6(a), this rule excludes Saturdays and legal holidays as well as Sundays from prescribed periods of less than seven days. It provides that a limited period shall not end on a Saturday, Sunday or legal holiday, but shall end on the next succeeding business day. See G.L. c. 4, § 9, which does not exclude Saturdays. Those legal holidays which shall be excluded are catalogued in G.L. c. 4, § 7, cl. 18 (as amended, St. 1978, c. 12).

An exception to the first sentence is found in the Case Management rule, which provides that in the computation of that rule's time limits, an excluded period shall include both the first and last days of the excludable act or event. Mass. R. Crim. P. 36(b)(3).

Uniform Rule 753 is also phrased in terms of a "designated period of time" and is intended to "not authorize automatic exclusion of the first day or of Saturdays, Sundays, or holidays in complying with provisions which require action 'promptly,' 'without unnecessary delay,' within a 'reasonable' time, or the like." Rules of Criminal Procedure (U.L.A.) rule 753(a) Comment (1974). Similar requirements prescribed by these rules or by court order are likewise not extended by the excludable days of this rule.

## Subdivision (b)

This subdivision grants the court discretion to relieve the parties from strict compliance with time requirements in three situations: first, upon request made before the expiration of an original period or a previously-extended period; secondly, upon motion made after the expiration of a period; and thirdly, upon agreement of the parties. In all three instances the party is entitled to relief "for cause shown." In the second situation, the failure to act must have been due to "excusable neglect." Because a motion must state with particularity the grounds on which it is based, Mass. R. Crim. P. 13(b), a bare assertion of excusable neglect without more is insufficient. See 6 Mass. Practice Series, *supra*, comments § 6.4.

Neither the federal civil nor criminal rules expressly authorize enlargement by stipulation. While it is stated that under prior Massachusetts practice a stipulation as to enlargement ordinarily did not need court approval, 6 Mass. Practice Series, *supra*, § 6.5, Mass. R. Civ. P. 6(b)(3) appears to require such approval. It is intended that under this rule the approval of the court is to be obtained.

A motion for a required finding of not guilty must be made at the close of the Commonwealth's or the defendant's case, Mass. R. Crim. P. 25(a). Under subdivision (b)(2)



of that rule, the motion, if denied, can be renewed within five days after the jury is discharged. In neither case can the court enlarge the time within which the motion is to be made.

A motion to reduce or revoke a sentence is to be filed within sixty days after the imposition of the sentence and such time is not to be enlarged. Mass. R. Crim. P. 29(a).

### Subdivision (c)

It should be noted that the provisions that an affidavit in support of a motion must be served with the motion and that opposing affidavits are to be served at least one day before the hearing are applicable to pretrial motions under Mass. R. Crim. P. 13.

## Rule 47: Special Magistrates

(Applicable to Superior Court)

The justices of the Superior Court may appoint special magistrates to preside over criminal proceedings in the Superior Court. Such special magistrates shall have the powers to preside at arraignments, to set bail, to assign counsel, to supervise pretrial conferences, to mark up pretrial motions for hearing, to make findings and report those findings and other issues to the presiding justice or Administrative Justice, and to perform such other duties as may be authorized by order of the Superior Court. The doings of special magistrates shall be endorsed upon the record of the case. Special magistrates shall be compensated in the same manner as is provided by the General Laws for the compensation of masters in civil cases.

## Rule History

*Effective July 1, 1979.*

## Reporter's Notes

*(1979)*

Under prior law, magistrates served primarily as bail commissioners, G.L. c. 262, §§ 23-24. Sections 62B and 62C of chapter 221 of the General Laws, inserted by St. 1978, c. 478, § 250, established the office of Magistrate in all Departments of the Trial Court and gave to that official certain quasi-judicial powers. This rule is not intended to expand the powers which such statutory Trial Court Magistrates may exercise, but to create the new and separate position of Special Magistrate in the Superior Court Department.

Special Magistrates in criminal cases shall have the authority to assign counsel (Mass. R. Crim. P. 8), set bail, and preside at arraignment (Mass. R. Crim. P. 7), and their duties shall include the supervision of pretrial conferences (Mass. R. Crim. P. 11) and the marking up of pretrial motions for hearing (Mass. R. Crim. P. 13). The rule is broad enough to permit assignment of some fact finding functions to Special Magistrates, although the exact dimension of those functions is left to definition by appropriate order of the Administrative Justice of the Superior Court Department. In this respect the Special Magistrate will differ little from masters as appointed by the Supreme Judicial Court under long-standing practice, especially in habeas corpus proceedings.

It is intended that Special Magistrates under this rule, because of the nature of their quasi-judicial responsibilities, be at the least attorneys admitted to practice before the bar and preferably that they be retired judges. Special Magistrates are to be compensated as are masters in civil practice. G.L. c. 221, § 55 (as amended, St. 1978, c. 478, § 247); Mass. R. Civ. P. 53(a), Superior Court Rule 49(3) (1974).

While similar to federal magistrates, the office of Special Magistrate under this rule does not carry with it such broad powers. The federal officer can conduct trials for minor offenses and sentence those who are found guilty. 18 U.S.C. §§ 3401-02. Before a federal magistrate can conduct a trial, however, the defendant must consent in writing and specifically waive both a trial before a District Court judge and the right to trial by jury, subject to enumerated qualifications. Under this rule the defendant is to have no objection to proceeding before a Special Magistrate since the functions to be performed by the office of Special Magistrate are administrative rather than adjudicatory.

## Rule 48: Sanctions

(Applicable to District Court and Superior Court)

A wilful violation by counsel of the provisions of these rules or of an order issued pursuant to these rules shall subject counsel to such sanctions as the court shall deem appropriate, including citation for contempt or the imposition of costs or a fine.

## Rule History

*Effective July 1, 1979.*

# Reporter's Notes

(1979)

This rule is intended to supplement rather than supplant the provisions of prior law relative to the power of the courts to regulate the conduct of attorneys who practice therein and to discipline those whose actions fall short of accepted standards. The rule applies equally to attorneys and to defendants who appear pro se.

In addition to the sanctions of citations for contempt and the imposition of costs or a fine, the rule contemplates referral to the Board of Bar Overseers where appropriate.

See e.g., Supreme Judicial Court Rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer (Feb. 14, 1979); ABA Standards Relating to the Prosecution Function § 1.1 (Approved Draft, 1971); ABA Standards Relating to the Defense Function § 1.1 (Approved Draft, 1971).

## Rule 49: Restitution

### (a) Request for Restitution

#### *(i) After Trial*

In the case of a conviction after a trial, the Commonwealth may request an order of restitution at any time prior to the completion of the sentencing hearing or, with the permission of the judge for good cause shown, within sixty days of the disposition.

#### *(ii) Plea or Admission*

In the case of a guilty plea or admission to sufficient facts, the Commonwealth may request an order of restitution as part of its disposition recommendation. In the case of a defendant-capped plea, the terms of the defendant's request may, but need not, include a cap on any restitution award.

### (b) Restitution Hearing

#### *(i) Timing*

In the judge's discretion, the judge may decide the question of restitution at the time of the disposition hearing or at a separate hearing conducted after the disposition.

## *(ii) Determination of Victim's Loss*

The judge shall determine the economic loss suffered by the victim or victims that is causally connected to the defendant's actions and then may, in the judge's discretion, set a maximum restitution amount not exceeding that loss. The Commonwealth bears the burden of showing the economic loss by a preponderance of the evidence.

## *(iii) Determination of Ability to Pay*

After determining the loss amount, the judge shall conduct an inquiry into the defendant's ability to pay. The defendant bears the burden of showing by a preponderance of the evidence the amount that the defendant is able to pay without creating a substantial financial hardship for the defendant or the defendant's dependents. The judge shall determine the defendant's ability to pay and set a restitution payment schedule that does not exceed the defendant's ability to pay. If the defendant is incarcerated or sentenced to incarceration, the judge may, in the exercise of discretion, defer the determination of the defendant's ability to pay until the defendant's release from incarceration or until a reasonable period after the defendant's release from incarceration.

## **(c) Redetermination of Ability to Pay**

At any time prior to the termination of probation, either party or the probation service may file a written motion requesting that the judge redetermine the defendant's ability to pay. Unless the motion lacks a reasonable basis, the judge shall promptly hold a redetermination hearing. The probation service shall notify the victim or victims of the hearing. At a redetermination hearing, the defendant bears the burden of showing by a preponderance of the evidence the current amount that the defendant is able to pay without creating a substantial financial hardship for the defendant or the defendant's dependents. The judge shall determine the defendant's current ability to pay and set a restitution payment schedule that does not exceed the defendant's ability to pay or the maximum restitution amount previously determined.

## **(d) Conclusion of Probation**

Except at the defendant's request for good cause shown, the period of probation shall not be extended because of unpaid restitution in the absence of a willful violation of the conditions of probation.

# Rule History

*Adopted November 26, 2024, effective March 1, 2025.*

## Reporter's Notes

(2025)

This rule codifies procedures for the ordering of restitution as a condition of probation and for the method of calculating and scheduling the payment of restitution.

### Restitution

In Massachusetts, the court's "power to order restitution in criminal cases derives from the judge's power to order conditions of probation under G. L. c. 276, §§ 87, 87A, and G. L. c. 279, § 1." *Commonwealth v. Denehy*, 466 Mass. 723, 737 (2014) (internal quotations omitted) (citing *Commonwealth v. McIntyre*, 436 Mass. 829, 833 (2002)). With the exception of certain theft, fraud, and vandalism offenses that mandate restitution by statute, restitution is "an entirely judicially determined penalty" that is distinct from "punishments such as imprisonment and fines that are accompanied by statutory prescription." *Denehy*, 466 Mass. at 737 (Because restitution is not subject to statutory prescriptions but is instead within a judge's discretion to order, there is no Sixth Amendment right to jury determination of restitution amount); *Commonwealth v. Nawn*, 394 Mass. 1, 8-9 (1985) (No right to a jury trial on order for restitution). As a judicial function, the judge may not delegate to the probation office the determination of restitution, the determination of the defendant's ability to pay, or the setting of the payment schedule. *Commonwealth v. Henry*, 475 Mass. 117, 120-121, 125 (2016).

For statutes providing for mandatory restitution pursuant to G. L. c. 276, § 92, see G. L. c. 266, § 27 (theft of tools), G. L. c. 266, § 28 (theft or vandalism of a motor vehicle), G. L. c. 266, § 111B (motor vehicle insurance fraud), and G. L. c. 266, § 139 (VIN defacement). For other theft and fraud related statutes providing for mandatory restitution, see G. L. c. 152, § 14 (workers compensation fraud), G. L. c. 175H, §§ 2 and 7 (false health care claims), G. L. c. 175H, §§ 3 and 7 (health care kickbacks), G. L. c. 266, § 27A (concealment of a vehicle to defraud insurer), G. L. c. 266, § 37E (identity fraud), G. L. c. 266, § 87 (larceny of leased or rental property), and G. L. c. 266, § 99A (theft of library materials). For other vandalism related statutes providing for mandatory restitution, see G. L. c. 160, § 225 (malicious injury to a railroad), G. L. c. 266, § 100 (vandalism of library materials) G. L. c. 266, § 108 (destruction of a vessel), G. L. c. 266, § 126A (vandalism of personal property), and G. L. c. 266, § 126B (tagging public or private property by paint or stickers).

Restitution is also mandated to the government for conviction of certain offenses involving damage to public property, see G. L. c. 266, § 94 (malicious destruction of traffic signs and markers), G. L. c. 266, § 95 (vandalism of historical markers), G. L. c. 266, § 96 (vandalism of state buildings), and G. L. c. 266, § 97 (vandalism of county buildings), and for offenses involving threats to public safety or infrastructure the response to which may impose particular costs, see G. L. c. 266, § 102D (possession of incendiary or hoax devices), G. L. c. 266, § 123A (willful trespass upon public water supply), G. L. c. 269, § 14 (threats of weapons, explosives, hijacking, or disruption of public facilities), and G. L. c. 269, § 14B (false or silent 911 calls).

Victims have a statutory right to seek that restitution be ordered as part of the disposition of a case, as well as to the assistance of the prosecutor in documenting their economic losses and to receive a payment schedule if restitution is ordered. G. L. c. 258B, §§ 1, 3(o).

In addition to advancing the general goals of sentencing, restitution compensates victims for their economic losses caused by the defendant's actions. *McIntyre*, 436 Mass. at 833 n 2. Restitution may not be used, however, as a reward or incentive for dismissal of a case. *Commonwealth v. Rotonda*, 434 Mass. 211, 220 (2011). Restitution is thus distinct from an order that the defendant pay to the Commonwealth the costs of the prosecution. G. L. c. 280, § 6 (While costs may not be imposed as a penalty, a judge may order as condition of dismissal, placing on file a complaint or indictment, or as a term of probation, that the defendant pay "the reasonable and actual expenses of the prosecution."). Restitution is also distinct from accord and satisfaction. See G. L. c. 276, § 55; *Commonwealth v. Guzman*, 446 Mass. 344, 349 (2006).

## Requirements for restitution

The Supreme Judicial Court has recognized several restrictions on the determination and ordering of restitution. *Denehy*, 466 Mass. at 737 n 20. First, any restitution award must be connected to the crime. *McIntyre*, 436 Mass. at 835 ("Restitution is limited to loss or damage that is causally connected to the offense and bears a significant relationship to the offense."). Second, restitution is limited to the victim's economic losses. *Rotonda*, 434 Mass. at 220-221 (Reversing restitution order that defendant make \$5000 payment to victim as a condition of unsupervised probation because it was unsupported by any statute). Third, a restitution order requires evidentiary support. *Id.* at 221-222; *Nawn*, 394 Mass. at 7. Fourth, the procedure for determining restitution must be fair and reasonable, with a hearing and an opportunity to cross-examine witnesses and to present evidence. *Nawn*, 394 Mass. at 6-7. Fifth, any restitution amount ordered may not exceed a defendant's ability to pay. *Henry*, 475 Mass. at 120-121. Finally, any period of probation may

not be extended where a defendant violates an order of restitution solely because of an inability to pay. *Henry*, 475 Mass. at 124.

## Sequence of determinations and burdens

While the question of restitution may be decided at the time of the disposition hearing, the sequence of determinations the judge must make is critical to ensure that any restitution order complies with requirements the Supreme Judicial Court has established. This sequence is reflected in Mass. R. Crim. P. 49(b)(ii)-(iii).

The judge must first determine the actual economic loss suffered by the victim or victims causally connected to the defendant's crime. *Henry*, 475 Mass. at 121. The Commonwealth bears the burden of proof on the amount of loss by a preponderance of the evidence. The maximum restitution may not exceed this amount, and the judge has the discretion to set a lesser amount if the interests of justice so indicate. *Id.* See Mass. R. Crim. P. 49(b)(ii). Codefendants may be held jointly and severally liable for an amount of restitution, again in the judge's discretion. See, e.g., *Commonwealth v. Amaral*, 78 Mass. App. Ct. 557, 559 (2011); *Commonwealth v. Caparella*, 70 Mass. App. Ct. 506, 517 (2007).

After determining the economic loss, the judge shall determine the defendant's ability to pay, and set a schedule for restitution payments that does not exceed the defendant's ability to pay. *Henry*, 475 Mass. at 121. If the defendant claims that the maximum restitution amount exceeds the defendant's ability to pay, the defendant bears the burden of proving this proposition. *Id.* The judge must then set a schedule of restitution payments consistent with the defendant's ability to pay that does not exceed the period of probation. *Henry*, 475 Mass. at 123 ("A judge may not ignore a defendant's ability to pay in determining restitution under the rationale that, if the defendant were to violate the probation condition of payment of restitution because of an inability to pay, the judge would not revoke probation but would instead extend the period of probation to allow the defendant more time to pay."). See Mass. R. Crim. P. 49(b)(iii). When an order of restitution is made in cases involving codefendants, the judge must make individual determinations concerning each defendant's ability to pay and set a payment schedule appropriate for each defendant.

The schedule of restitution payments should not affect the duration of probation. *Henry*, 475 Mass. at 124 ("[T]he length of probation supervision imposed at the time of sentence should not be affected by the financial means of the defendant or the ability of the defendant to pay restitution"). To reduce the risk that the ability to pay determination affects the length of any period of probation, "the ability to pay determination should be made only after the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the

defendant and protecting the public.” *Id.*, at 125 (italics in original). When the judge determines that probation is not appropriate for any reason other than to collect restitution, the judge may—but is not required to—impose a brief period of probation. Even for restitution ordered as a condition of such a brief period of probation, the judge must still make the determinations of economic loss and ability to pay during this period. *Id.* at 125 n 8. Any time before the termination of probation the judge may, upon motion of either party or the probation service, hold a hearing to redetermine the defendant’s ability to pay. *Commonwealth v. Brown*, 102 Mass. App. Ct. 233, 235 (2023). The defendant bears the burden of proving current ability to pay in a redetermination hearing. See Mass. R. Crim. P. 49(c). Except at the request of the defendant, the period of probation may not be extended because of unpaid restitution absent a willful violation of the conditions of probation. *Henry*, 475 Mass. at 124 n 5. See Mass. R. Crim. P. 49(d). Even with the defendant’s assent, the parties must show good cause for the requested extension.

## **(a) Request for Restitution**

The Commonwealth may request an order of restitution as part of the disposition in a case. The time for this request depends upon the resolution of the case.

### ***(i) After trial***

For a conviction after a trial, the Commonwealth may request an order of restitution at any time before completion of the sentencing hearing or, with the permission of the judge for good cause shown, within sixty days of the disposition.

### ***(ii) After Plea or admission***

For a case resolved by guilty plea or admission to sufficient facts, the Commonwealth may request an order of restitution as part of its disposition recommendation during the plea colloquy. See Mass. R. Crim. P. 12(c)(4). The Commonwealth would not be allowed to request an order of restitution after the colloquy.

For a case in District Court in which a defendant tenders a guilty plea pursuant to G. L. c. 278, § 18 in which there is no agreement as to a recommended disposition, the defendant may address restitution as part of any request for a specific disposition. The defendant may, as part of any request for a specific disposition, agree to accept restitution as determined by the judge, agree to accept a specific maximum restitution amount, agree to accept a restitution amount determined by a judge but not to exceed a specific amount, or not agree to accept restitution as part of the disposition.

Restitution may be requested for cases adjudicated in juvenile court. *Commonwealth v. Avram A.*, 83 Mass. App. Ct. 208, 211 (2013); G. L. c. 119, § 62. See also G. L. c. 119, § 58B (restitution for juvenile adjudicated delinquent of motor vehicle offenses).



## (b) Restitution hearing

Unless the defendant stipulates to the victim's loss and the restitution amount, the judge may not enter an order of restitution without conducting a restitution hearing.

*Commonwealth v. Molina*, 476 Mass. 388, 408 (2017) ("A hearing on the request for restitution is necessary if the basis for the request or the amount of restitution to be ordered is in dispute."); *Henry*, 475 Mass. at 120 ("Where the defendant does not stipulate to the amount, the judge should conduct an evidentiary hearing" to determine the victim's losses.). If the Commonwealth will seek restitution, it should disclose the amount of restitution it will seek prior to the restitution hearing. *Henry*, 475 Mass. at 120.

"A restitution hearing need not be elaborate but must be reasonable and fair." *Molina*, 476 Mass. at 408 (citing *Nawn*, 394 Mass. at 6). The evidentiary rules at a restitution hearing, like those at a probation violation hearing, are flexible enough to consider evidence that would not be admissible at trial. *Commonwealth v. Casanova*, 65 Mass. App. Ct. 750, 756 (2006). "[H]earsay, if reliable, is admissible to carry the Commonwealth's burden at a restitution hearing." *Commonwealth v. Amaral*, 78 Mass. App. Ct. at 560 (Uncertified dental bill for restoration of victim's teeth damaged in defendant's assault properly supported restitution order despite lack of compliance with G. L. c. 233, § 79G for exception to rule against hearsay).

At a restitution hearing, the defendant must have a meaningful opportunity to be heard and to cross examine witnesses. *McIntyre*, 436 Mass. at 834. If the victim testifies to the losses, the defendant should have an opportunity to "cross-examine the victim, with such cross-examination limited to the issue of restitution. The defendant may rebut the victim's estimate of loss with expert testimony or other evidence." *Henry*, 475 Mass. at 120 (internal citations omitted).

### ***(i) Timing***

The judge may, in the exercise of discretion, decide the question of restitution at the disposition hearing or at a separate hearing conducted later.

### ***(ii) Determination of victim's loss***

The judge must first determine the victim's loss. The restitution amount is limited to the victim's "economic losses caused by defendant's conduct and documented by the victim." *Rotonda*, 434 Mass. at 221. This might include "such items as medical expenses, court-related travel expenses, property loss and damage, lost pay, or even lost paid vacation days required to be used to attend court proceedings." *Id.*

The Commonwealth bears the burden of showing, by a preponderance of the evidence, that the victim's loss "is causally connected to the offense and bears a significant

relationship to the offense.” McIntyre, 436 Mass. at 835 (Restitution ordered for defendant convicted of assault and battery with a dangerous weapon could include property damage incurred by victim that bore significant causal relationship to the assault and battery); Denehy, 466 Mass. at 739-740 (Restitution order could include cost of officer’s eyeglasses broken in scuffle with defendant convicted of disorderly conduct and assault and battery by means of a dangerous weapon notwithstanding defendant’s acquittal for assault and battery on a police officer.). Compare Commonwealth v. Palmer P., 61 Mass. App. Ct. 230, 232 (2004) (Restitution order for juvenile convicted of breaking and entering with intent to commit larceny but acquitted of larceny could properly include value of property taken where judge could conclude breaking and entering facilitated taking of property by allowing others to enter), with Casanova, 65 Mass. App. Ct. 750, 756-757 (2006) (Restitution order for defendant convicted of assault and battery was unsupported where there was no evidence of causal nexus between assault and victim’s withdrawal from school and resulting forfeiture of tuition.).

The victim’s loss may be documented by third parties as well as by the victim, and there is no requirement that the victim have submitted an insurance claim for the loss.

Commonwealth v. Yeshulas, 51 Mass. App. Ct. 486, 492 (2001) (Arson defendant’s restitution properly based on testimony by fire department personnel estimating damage by fire and smoke); Commonwealth v. Williams, 57 Mass. App. Ct. 917, 917 (2003) (Judge could rely in part on repair cost estimates rather than actual costs, and there is “no requirement that a victim must submit a claim under any insurance policy that might cover the loss before an order of restitution can be made.”). Restitution may be awarded based on a third party’s repair estimate, even if the victim made the repairs without using a third party. Avram A., 83 Mass. App. Ct. at 215.

After the judge has determined the amount of the victim’s loss, the judge sets a maximum restitution amount that must not exceed the amount of the victim’s loss. Mass. R. Crim. P. 49(b)(ii). The judge may exercise discretion to set the maximum restitution amount at less than the amount of the victim’s loss if the defendant’s rehabilitative needs or other interests of justice would be served thereby. The judge may also exercise discretion to order restitution to a third party if that person suffered economic loss causally connected to the defendant’s actions and ordering restitution is primarily designed to meet the goals of sentencing and probation. Commonwealth v. McGann, 484 Mass. 312, 327-328 (2020) (Judge properly exercised discretion to order restitution to victim’s mother for her payments of victim’s medical expenses arising from assault by defendant).

### ***(iii) Determination of ability to pay***

After the judge has determined the restitution amount, the judge must determine the defendant's ability to pay. Henry, 475 Mass. at 120-121; Nawn, 394 Mass. at 7, 8-9. Because restitution in a criminal case may be ordered only as a condition of probation, imposing restitution that a defendant will be unable to pay—and for which the defendant will thus inevitably risk a probation violation—“violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty.” Henry, 475 Mass. at 122; *Bearden v. Georgia*, 461 U.S. 660, 669 n 10 (1983) (basic fairness forbids revocation of probation when the probationer is without fault in failing to make required payments). When a defendant is incarcerated or sentenced to incarceration, the judge may defer determination of the defendant's ability to pay until the defendant's release from incarceration or a reasonable time thereafter. Mass. R. Crim. P. 49(b)(iii).

In considering the defendant's ability to pay, “the judge must consider the defendant's financial resources, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and [the defendant's] dependents.” Henry, 475 Mass. at 126. Potential income may be attributed to a defendant only after a specific finding that the defendant is earning less than could be earned through the defendant's reasonable effort. *Id.* at 127. Cf. *Commonwealth v. Vallejo*, 480 Mass. 1001 (2018) (Restitution order of \$140 inadequately considered defendant's ability to pay without substantial financial hardship where defendant, who lived in low income housing, testified she was not working due to a back injury and had no income.).

Restitution cannot be ordered that would cause substantial financial hardship to the defendant or the defendant's dependents. Henry, 475 Mass. at 127; Cf. S.J.C. Rule 3:10, § 10(a), 475 Mass. (2016) (waiver of indigent counsel fee where defendant is unable to pay without substantial financial hardship within 180 days). Restitution payments that would deprive a defendant or a defendant's dependents of minimum basic human needs necessarily cause substantial financial hardship and would be impermissible. Henry, 475 Mass. at 127.

When the defendant claims that the economic loss exceeds the defendant's ability to pay, the defendant bears the burden of proving this by a preponderance of the evidence. *Id.* at 121. If the defendant has already been found indigent, the Supreme Judicial Court has cautioned that “a judge should carefully consider whether restitution can be ordered without causing substantial financial hardship.” *Id.* at 127.

“Once the judge has determined the appropriate length of the probationary period, restitution may be a condition of probation for the length of that period at the maximum

monthly amount that the defendant is able to pay, provided the total amount does not exceed the actual loss.” Id. at 125. This payment schedule must be set by the judge; its determination may not be delegated to the probation service. Id. The judge does not set a figure for the total restitution to be paid, except to the extent that the total restitution paid will not exceed the maximum restitution amount set.

It is possible, and permissible, that the payment schedule will not result in the payment of the full maximum restitution amount set. If, on the other hand, the defendant has the ability to pay the entire maximum restitution amount, the judge may divide the payment of restitution over the course of the probationary term, but need not do so if a different division would be preferable. The judge may order payments be made to the probation officer, who can keep an accounting of payments, make payments to the victim, provide receipts, and notify the clerk of the court when full payment has been made. G. L. c. 276, § 92.

### (c) Redetermination of ability to pay

A defendant’s ability to pay may change over time, and any time before the termination of probation either party or the probation service may file a written motion seeking a redetermination of the defendant’s ability to pay. Brown, 102 Mass. App. Ct. at 236. (The judge may also require that the defendant report any change in ability to pay to the probation officer, who may petition the judge for a modification in the payment schedule due to a material change in the defendant’s financial circumstances. Commonwealth v. Goodwin, 458 Mass. 11, 18 (2010)).

Unless the motion for redetermination lacks a reasonable basis, the judge shall promptly hold a redetermination hearing. The court shall direct the probation service to notify the victim or victims of the redetermination hearing. G. L. c. 258B, § 3(o) (Crime victims have a right to notification by probation officer if the defendant seeks a modification of the restitution order and to be heard at a modification hearing). The defendant bears the burden of showing by a preponderance of the evidence the current amount that the defendant is able to pay without creating a substantial financial hardship for the defendant or the defendant’s dependents. The judge shall then determine the defendant’s ability to pay and set a restitution payment schedule that does not exceed the defendant’s ability to pay or the maximum restitution amount previously determined.

### (d) Conclusion of probation

Except at the request of the defendant, a judge may not extend a period of probation because of unpaid restitution absent a willful violation of the conditions of probation. Henry, 475 Mass. at 23-124 and n 5. Extending probation due to a defendant’s inability to

pay would subject the defendant to additional punishment because of poverty, which contradicts basic fairness. *Commonwealth v. Canadyan*, 458 Mass. 574, 578-579 (2010) (Absent willful noncompliance, homeless defendant could not be found in violation of GPS monitoring condition where homeless shelters could not accommodate the technological demands of the GPS equipment supplied by the probation department). Compare *Commonwealth v. Bruno-O'Leary*, 94 Mass. App. Ct. 44 (2018) (Probationer's partial payments in some months and no payments in others was insufficient basis to conclude noncompliance was willful when uncontested evidence showed probationer was unemployed, had two children, and her only sources of income were Social Security disability benefits and food stamps), with *Commonwealth v. Pereira*, 93 Mass. App. Ct. 146, 150-152 (2018) (Judge's implicit finding of willful noncompliance supported by absence of evidence from the probationer concerning inability to pay after she initially agreed to restitution schedule).